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T O

The Hon'ble **SIR GEORGE THOMAS**, Kt., Bar-at-law.

Chief Judge, the Chief Court of Oudh, Lucknow.

THIS BOOK

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*By
The Author.*

HINDU LAW
AND
JURISPRUDENCE
WITH
MIMANSA RULES OF INTERPRETATION

HINDU LAW
AND
JURISPRUDENCE
WITH
MIMANSA RULES OF INTERPRETATION

VOLUME I

BY
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Muslim Law, Lawyers' and Abridged Editions,

FIRST EDITION

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BOOK I
HINDU JURISPRUDENCE

FOREWORD

Mr. Kashi Prasad Saksena, M. Sc, LL. B., Advocate, is the author of several law books, his latest being the Hindu Jurisprudence. The book is an improvement upon the well-known work of the late Dr. P. N. Sen, Tagore Law Professor of the Calcutta University. The author has taken pains and his comparison of Hindu system with that of the Romans will make interesting reading. Principles of Hindu Law have been well discussed. The subject has been dealt with from a comparative, analytical and juristic point of view and the treatment shows research and scholarship. The work brings out the successive stages of development of the different juristic concepts as found in the original Sanskrit works, and gives a clear idea of the basic principles of Hindu Law. I have not the slightest doubt that it will be of valuable help to the post-graduate students of the University and the members of the Bench and Bar alike.

THE CHIEF COURT OF OUDH,
LUCKNOW.

21st February, 1941.

G. H. THOMAS, KT.

Chief Judge.

PREFACE TO THE FIRST EDITION

This book attempts to present the Hindu system of law in the light of modern European Jurisprudence. The need to review Hindu Law on the lines of modern ideas and legal conceptions has been felt for long. The main purpose of the book is to give lawyers and post-graduate students of Hindu Law an insight into the principles of Hindu Jurisprudence. In this book the author has endeavoured to show the superior character of Hindu Jurisprudence over others—ancient or modern. That superiority remained obscure due to the language, abstruse and difficult classical Sanskrit, in which the literature on the subject was to be found, so much so that its very existence began to be doubted.

The pioneer on this untrodden path was that eminent and erudite young lawyer of Bengal, the late Dr. Priyanath Sen, M. A., D. L., Tagore Law Professor of the Calcutta University. The author has received guidance from his learned work. He has ventured to follow in his foot-steps.

Recent historical research has disclosed that the Hindu system of law is older than even the Roman system. The English system of law is admittedly derived from the Roman Law. The Hindu system being older cannot be said to have been derived from the Roman. Sir Francis Macnaghten and other English jurists have admitted that the merit of having been the founders of their own system of jurisprudence cannot be denied to the Hindus.

The author has compared in this treatise the Hindu system with that of the Romans. He can safely assert that the Hindu system of jurisprudence is complete, faultless and perfect, and compares favourably with

the so-called most developed Roman system of ancient jurisprudence. In the Hindu system all aspects of life and society, *viz.*, the interest of the individual, of the community and of the relation between the two have been kept in view. This assertion is made without any bias. It is simply an answer to those self-styled critics who start with a prejudice against *everything* "*Hindu*." A fair and honest investigator will, it is hoped, not hesitate to agree with the above statement, based as it is on true facts.

On comparison with other systems, the following points of excellence stand out in bold relief as regards Hindu Law, as represented to us by the learned venerable sages and commentators :—

- (i) Comprehensiveness.
- (ii) Simplicity.
- (iii) Logical consistency.
- (iv) Breadth and perspicuity of the conception of legal liability.
- (v) Continuation of growth and evolution in conformity with the changing aspects of juridical relations owing to complexity of human affairs, in spite of retention of the eighteen titles of law, as given by Manu.

The Hindu system throughout displays logical subtlety of discrimination, analytical skill and sublime accuracy in the definitions of legal conceptions. Law, which is the manifestation of the eternal truth that rules this Universe, can justify itself by being conducive to the welfare of the people, who are governed by it. The king cannot over-ride it, the judges cannot over-rule its supremacy and the people are bound by it, not because of its temporal support but because of its emanation from the Supreme will and wisdom of the Almighty. No one, in short, can ride rough-shod over it. Though our law-givers meditated upon the potentialities of

existence beyond this world with an earnestness unsurpassed in the history of Philosophy, ancient or modern—they were not mere dreamers, but were fully conscious of, and had thorough and practical insight into, the worldly life, so much so that nothing human was foreign to them.

Under the Hindu system, a high sense of duty in the administration of justice would be apparent even to a casual observer. It cannot be denied that the idea uppermost in the mind of our law-givers had been to discharge their duty conscientiously. Temporary expediency was not with them a guiding principle, although it was occasionally resorted to. They were mainly guided by the highest ideal '*Dharma*,' which includes the supremacy of morals and the eternal good of the world.

The author closes this preface with an ardent desire and a fervent hope that this humble work will *primarily* explode the ridiculous assumption and unfounded belief, held for centuries, that the Hindus had no system of jurisprudence of their own, simply because their books of law were written in the Sanskrit language,—now neglected and not commonly learnt—and, *secondly*, render as much help as possible to seekers of the hidden treasures of legal knowledge.

Ganga Prasad Road
Lucknow
2nd January, 1941.

} Kashi Prasad Saksena.

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CHAPTER I

INTRODUCTION

SECTION I. HISTORICAL INTRODUCTION AND HINDU SCIENCE OF LAW

The Hindu system of jurisprudence is a well-developed science. It is as old as humanity itself. It is the store-house of ancient wisdom, inherited from hoary sages, saints, philosophers and thinkers whose ideals were the loftiest, whose ideas were derived from imperishable Vedas and who can literally be described as the torch-bearers of learning and knowledge to the rest of the world, as it then existed. It is thorough, complete and self-contained. The systems of law that followed Hindu Jurisprudence have not, even to the present-day reached the borders of its eternal height; presumption of any one of them having surpassed it in excellence or completeness is simply ludicrous. In point of comprehensiveness, the Hindu Law in its various branches occupies a fairly high place among the systems of ancient jurisprudence. In the *first* place, its conception of legal liability is very perspicuous, and in spite of its retention of the eighteen divisions of topics of litigation, as described by Manu, its growth has not been stinted, the various aspects of juridical relations developing equally within its orbit as in other systems of law. *Secondly*, the administration of justice is clearly actuated by a high sense of duty and a very lofty ideal of the law-givers regarding the functions which they had to discharge; they were moved by the higher ideal of *Dharma* which in one of its phases looks up to revelation, and in another, looks forward to the permanent welfare of the entire sentient world. *Thirdly*, keen logicity, subtlety of discrimination, analytical skill and mathematical accuracy in defining legal conceptions are its special traits, the refined rules of ratiocination of Gautama and the principles of interpretation of Jaimini are too well-known to need any mention. *Lastly*, the reasonableness of the rules has been kept in view all along the line so that they may not be detrimental to the interests of the community at large.

Hindu Jurisprudence explained and the importance of its study.

For the systematic and scientific study of Hindu Law in the light of present-day juristic ideas and conceptions, the study of Hindu Jurisprudence—Hindu Law viewed from the standpoint of jurisprudence, or jurisprudence reflected through the medium of Hindu Law—is very essential. Jurisprudence, the science of law, is, as is well-known, divided into two branches: (1) *General* or *Abstract* Jurisprudence; (2) *Particular* or *Concrete* Jurisprudence. "The proper subject of general or universal jurisprudence," says Austin, "is a description of such subjects and ends of laws as are common to all systems, and of those resemblances between different systems which are bottomed in the common nature of man." "Jurisprudence, however, becomes *particular* or *concrete*, when it takes its *data* from a particular system of law, and exhibits the essential ideas and principles, which go to constitute jurisprudence proper,—not in an abstract form, but coloured and shaped, as it were, by the concrete details of that particular system," (a) We are here concerned with jurisprudence in its relation to the particular system of Hindu Law, exhibiting the shapes which those elements have assumed by reason of the characteristic development of that system under the influence of historical and other events, the particular line of evolution through which the system has passed, and the particular stage of development which it has attained. Hindu Jurisprudence would, therefore, imply the examination and ascertainment of the Hindu conceptions of general topics of jurisprudence, as unfolded in the works of Hindu law-givers of recognised authority, with a view to exhibit the characteristic development of Hindu Law in relation to the essential conceptions and principles common to all such systems (a). The importance of its study is well emphasised in the remarks of Mayne (b): "Hindu Law has the oldest pedigree of any known system of jurisprudence, and even now it shows no signs of decrepitude. At this day it governs races of men, extending from Cashmere to Cape Comorin, who agree in nothing else except their submission to it. No time or trouble can be wasted, which is spent in investigating the origin and development of such a system, and the causes of its influence."

The difficulties in the study of Hindu Jurisprudence are numerous. In the first place, the Hindu Dharma-sastras, the principal sources of Hindu Law, do not confine themselves to the enunciation of juristic rules for the guidance of human conduct, but ceremonial rules, moral and religious

Difficulties in the study of Hindu Jurisprudence.

(a) Dr. Sen's—The General Principles of Hindu Jurisprudence, p. 2.

(b) P. 11—Preface.

injunctions, and strict legal precepts are all mingled up, and no clear line of demarcation is drawn to keep them separate and prevent a confusion of ideas in the minds not sufficiently familiar with rules of logic and canons of construction by which they have to be distinguished from one another (a). This difficulty has been very forcibly pointed out by their Lordships of the Privy Council (c): "Their Lordships had occasion in a late case to dwell upon the mixture of morality, religion and law in the Smritis, *Bahvant Singh v. Ravi Kishari* (d). They had to decide whether a prohibition on alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing. They then said: All these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu Law Sir William Macnaghten (e) says: 'It by no means follows that because an act has been prohibited, it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible.' They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity, never contemplated by the original law-givers."

This difficulty is further enhanced by the fact that some of the most important ceremonies of the domestic life of Hindus, such as marriage and adoption, *etc.*, involve legal rules inter mingled with moral and religious adjuncts. Therefore, it is desirable that legal rules be separated, but not completely detached from their moral and religious bearing, particularly in cases where the ceremonies to which the legal rules relate, partake of both a religious and a secular character. Another difficulty arises from the *peculiar character of the science of jurisprudence itself* which is a Western science, having its foundation in the Roman Law, where legal rules have been reduced to order and its divisions and classifications re-arranged. Identical counterparts of the ideas and classifications cannot be found in Hindu Law; so it must be studied

(c) *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* 22 Mad. 308, 415.

(d) 25 I. A. 54, 60, 20 All. 267, 20 C. W. N. 271.

(e) 'Principles and Precedents of Hindu Law,' Vol. I, Preliminary Remarks p 11

from within, with such light as it itself affords. Hindu Law has had a development of its own, and due to the uncertainty of Hindu chronology the researches of modern antiquarians in this direction have given rise to hopelessly divergent conclusions that cannot be relied upon. Under the circumstance, the development of juridical ideas should be studied in the light of comparative jurisprudence, avoiding the error of extremes and dispelling the phantoms of superstition. Thus, the difficulties in the way of its study are three-fold: (i) peculiar character of the Hindu Dharma-sastras, (ii) peculiar character of the science of Hindu jurisprudence, and, lastly (iii) uncertainty of chronology.

According to Hindu jurists, duty is only the counterpart of law, and the term *duty* or *dharma* or *law* has been defined thus by the following two *sutras*:

Definition of law.

(1) **अथातो धर्मं जिज्ञासा**—Now then, the study of duty is to be commenced.

(2) **चोदनालक्षणेऽर्थो धर्मः**—Duty is a purpose which is inculcated by command.

Dr. Ballantyne translates them as follows:—

(1) Next, therefore, [O Student that best attained thus far] a desire to know Duty (*Dharma*) [is to be entertained by thee].

(2) A matter that is a Duty is recognised by the investigating character [of the passage of scripture in which it is mentioned].

Thus, the purpose and object of Jaimini's *Sutras* is to help the student in studying the texts, which indicate the duties to be performed by men. The second *Sutra* defines duty (*Dharma* to be virtually that which is determined as such by the Revealed Law texts. Though the texts of the Smritis are not revealed, yet the law contained therein is treated as revealed, as they are the sequence and the necessary corollaries of that law. According to one theory, the texts of Smritis had their corresponding texts in the Vedas which are now lost. The *Sruti Vidhis* are the direct revealed law, while the *Smriti Vidhis* represent law indirectly revealed.

The above defines law by implication; the two terms are co-related to each other, as Austin observes, "It also appears from what has been premised, that command, duty, and sanction are inseparably connected terms; that each embraces the same ideas in a peculiar order or series."

Jaimini's definition **चोदनालक्षणेऽर्थो धर्मः**: "what is to be fulfilled as the object of a command, is duty (*Dharma*)," contains only three words *Chodana*, *Lakshana* and *Artha*; the first two being parts of a compound word meaning that which is characterised by a command, the last 'Artha' meaning the object to be fulfilled. The word

'Chodana' means command. Colebrooke translates it as command, though it means a revealed command, which is the essential trait of the Hindu religion. In Gayatri Mantra the essence of the Vedas, the word 'Chodana' occurs with the prefix 'Pra' as the governing element of the whole Gayatri, in the following clause: "By whom our thoughts must be commanded" धियो यो नः प्रचोदयात् ।

Jaimini addresses himself to the question of sanction to Vedic Chodana (command) in the third Sutra:—"Let us examine the reason why the Vedic command is obligatory." तस्य निमित्तं पण्डितः [Jaimini I.i. 3] The answer is found in the fifth Sutra in these words:

"The reason consists in the eternal concomitancy between the word of the command and the purpose to which it is directed. The means of knowing this eternal connection is revelation which is unfailing in leading to transcendental benefit (heavenly bliss) being independent, as Badarayana has it." औत्पत्तिकः तु शब्दस्य अर्थेन सम्बन्धः तस्य ज्ञानम् उपदेशः अव्यतिरेकः च अर्थे अनुपलब्धे तत्प्रमाणं बादरायणस्य अनपेक्षत्वात् ।

"Thus the idea of sanction exists in the definition of Law as given by Jaimini. It is the certainty of obtaining by compliance with the *Chodana* (the revealed command) eternal bliss, not otherwise obtainable. This sanction is called 'Apurva' (unprecedented), being, in short, a reward beyond the reach of ordinary human effort. One may not believe this. But that is immaterial to the question. It is clear that the Mimamsa-shastra claims a sanction for the Vedic command, though it is, unlike the sanction, secured by the force of the bayonet."

Colebrooke (a) explains the 'Apurva' thus: "The subject which most engages attention throughout the Mimamsa, recurring at every turn, is the invisible or spiritual operation of an act of merit. The action ceases, yet the consequence does not immediately ensue; a virtue meantime subsists unseen, but efficacious to connect the consequence with its past and remote cause, and to bring about at a distant period, or in another world, the relative effect. That unseen virtue is termed *Apurva*, being a relation super-induced, *not before* possessed."

"This Apurva Sanction consisting in the certainty of a super-human benefit, however, is the sanction of positive Vedic commands which preponderate in the Vedic law (*Chodana*) as contradistinguished from negative or prohibitory command (*Nishedhas*). As regards the latter, the sanction consists of punishment, such as, penances, and in extreme cases, the suffering of the pangs of hell, accruing what is absolutely prohibited is done. When an act enjoined is done, it is

(a) Miscellaneous Essays, p. 343.

dharma (fulfilment of duty). When an act prohibited is done, it is *adharma* (violation of duty). *Dharma* is secured by the sanction of super-human benefit; *adharma* is prevented by the sanction of super-human punishment, and in some cases by human punishment as well."

Thus the modern definition of law and the modern idea of sanction attached thereto, are the same as those of Jaimini.

No correct estimate of the character of Hindu Law as a system of jurisprudence can be formed without tracing its growth and development from early times. Law, according to Hindu jurisprudence, is of a three-fold character :—

Character of Hindu Law as a system of jurisprudence.

- (1) **मनुष्य धर्मः** *i.e.*, religious or the spiritual and moral law.
- (2) **कृत धर्मः** *i.e.*, the ecclesiastical or sacrificial law.
- (3) **व्यवहार धर्मः** *i.e.*, the civil or temporal law.

Each of these three kinds of laws has an appropriate sanction, which consists either of some benefit or reward, or on the other hand, of some form of coercion or punishment. In the spiritual and moral law **मनुष्य धर्मः** the sanction is simply spiritual with moral benefit and reward. In the Kṛit Dharma **कृत धर्मः** there is the spiritual and moral sanction and, in addition, the coercion by ecclesiastical bodies and tribunals. In the Vyavahar Dharma **व्यवहार धर्मः** there are the above two kinds of sanctions at least in criminal matters, and, in addition, the coercion by the king's courts and popular tribunals. Thus, the sanction of Kṛit Dharma **कृत धर्मः** is two-fold and that of Vyavahara Dharma **व्यवहार धर्मः** three-fold, at least in some cases.

K. L. Sankar in his learned treatise (at p. 494) has nicely explained the nature of ancient and modern *sanction* thus :
Nature of ancient and modern sanction. "Coercion is the only thing recognized in our modern jurisprudence as sanction. The other kind of sanction of a Vidhi or law is the securing of benefit in the shape of a reward from some authority above; in other words, benefit other than what arises merely from the action of the man himself according to his desires and feelings, and is therefore, called *aprapta* (not otherwise obtained). Thus, there is an element of penalty in every case. As regards Manushia Dharma penalty is loss of heavenly bliss and the resultant sufferings of hell. In the case of Kṛit Dharma, there is the above penalty and, in addition, the penalty of penance and expiation. In the Vyavahara Dharma, in addition to the above, there is the penalty of punishment by the king. Thus, the sanction of a Vidhi, according to Hindu Jurisprudence consists both of hope and fear. But the definition of a Vidhi is usually with

reference to the hope. Accordingly, the definition is *aprapta prapti*, that which secures what is not spontaneously obtained. Thus what is spontaneously obtained by natural instinct is not a matter of Vidhi 'Eat when hungry' is not a Vidhi; 'sleep when tired,' is not a Vidhi, because these promptings are *prapta prapti*, containing a spontaneous benefit. But, 'Do not hurt any one' is a Vidhi; 'Buy and sacrifice' is a Vidhi; because in either of these cases, a reward is believed to be assumed by higher agencies. As regards mere statements or recitals, these are not Vidhis as already explained. Thus, the above exposition explains affirmatively what a Vidhi is and, negatively, what it is not. For spiritual and moral Vidhis, see Ganga Bhatta's *Padas and Vidhi Rahasya* by Appa Dikshita. As regards the ecclesiastical laws or *Krativārtha Vidhis*, they were enforced in Vedic times by the priests assembled at the great sacrificial ceremonies."

"In later times, the village ecclesiastical authorities extended their functions and formed a sort of ecclesiastical court to take cognisance, and punish, in their own way, all offences and sins which were provided against in the *Smritis*. Those offences were of two kinds—those that were more heinous and were called *Mahapataka* and, those which were of the nature of ordinary misdemeanours. The penances and expiations for the former class were, of course, severer than for the latter class. A person guilty of a *Mahapataka* was additionally liable to be punished by the king or his court. But the power of the ecclesiastical authorities, apart from the power of the king's court, was not to be trifled with. For, if a person guilty of a *Mahapataka* did not surrender himself to the ecclesiastical authorities and submit to the proper penance and expiation, he could not fare on with impunity. The village community, as a whole, would not allow such an offender to go scot-free. They had it in their power effectually to outcast the man and make his existence a burden. They had the village barber, the village washerman, the village decorator and also the village *Patwari* at their command. These village functionaries were bound to refuse service to any offender who had committed a heinous sin or crime."

Having considered the jurisdiction of the ecclesiastical courts, and that of the king's courts, the *Vyavahara* law may be studied. The term *Vyavahara* is generally used in contradiction to *sattvajnana* (spiritual consciousness) and means worldly conduct, so the *Vyavahara* law may be defined as law either based on or relating to worldly practices. It relates essentially to the practices observed by the people, the kingly power coming into prominence and intervening only to

give effect to it as is clear from the text of Narada : "Performance of duty having fallen into disuse, positive law has been introduced, the king as superintending the law is invested with power to punish."

नष्टे धर्मे मनुष्याणां व्यवहारः प्रवर्तते ।

द्रष्टुं स व्यवहाराणाम् राजा दण्डधरः स्मृतः ॥

In the Hindu system the theory of the exclusive Divine rights of king has not been recognised. Truly speaking, the Vyavahara *Dharma* (legal duties) is connected with *Raj Dharma* (the duties of king) and so the king has more of Divine liabilities than Divine rights. The Smritis, *e. g.*, Manu, (VIII. 1-20), Yajnavalkya, Vyavahara Adhyayas (1-4) and Achara Adhyayas (355-359) and others, impose manifold duties on the king and make him responsible for the due performance of the injunctions of the Vedas and Smritis. The Divine Law thus imposes upon the king the duty of administering justice between subject and subject and he is invested with the power of punishment to perform this duty effectively. The Vyavahara law and its sanction are both the out come of *Raj Dharma*, *i. e.*, the duties of the king, and in fact the Vyavahara law binds the king as well as the subjects. Yajnavalkya defines Vyavahara law (Vyavaharadhyaya II. 5) thus : "If one, aggrieved by others in a way contrary to the Smritis and usage, complains to the king, that is a matter of Vyavahara (civil law)."

King's divine right not recognised.

Vyavahara law defined.

स्मृत्याचारव्यपेतेन मार्गेणाधर्षितः पश्यैः ।

आवेदयति चेद्राज्ञे व्यवहारपदं हि तत् ॥

The Vyavahara Branch of Hindu Jurisprudence is more or less based upon the spiritual jurisprudence though there are important modifications introduced to suit the requirements of the Vyavahara Kanda. Now it is to be seen how far the jurisprudence of the Vyavahara Law is identical with the spiritual law. In spiritual or the ecclesiastical law, the sanction is the hope of obtaining what is absolutely unattainable by other means and the fear of losing it. In the Vyavahara law, the sanction is the hope of obtaining what the society, through its representative, the king, can and does secure to a man, and also the fear of incurring punishment at the hands of that representative of the society. This is the difference between the spiritual and the civil law; but in either case there is something to be gained or lost under some sort of compulsion, actual or constructive. In other respects, there is no difference between the two laws, and their classification has also been done in the same way. Both the Vyavahara Vidhis and the

Difference between spiritual and civil law.

spiritual Vidhis have been classed into Vidhi proper, Niyama and Parisankhya. The principles of Arthavada also occupy the same position both in the Vedic law and the Vyavahara law. In the Vedic law their elaborate division has been made, such as *Gunavada*, *Anuvada* and *Bhutarthavada*, but in the Vyavahara law they are mostly in the character of Anuvada, *i. e.*, gloss or explanation.

Matters, such as social, moral and legal are all treated in the Smritis; but there is a sharp line of demarcation between *Vyavahara*, the legal, and *Acharya*, the social and moral law, which may roughly be so called. Sir G. D. Banerjee in his Tagore Law Lectures is of opinion that the distinction cannot be maintained; *first*, because "Though in some Smritis, as in the institutes of Yajnavalkya, the Dharma-shastra is divided into three sections relating respectively to *Acharya* or ritual, *Vyavahara* or jurisprudence, and the *Prayaschittas* or expiation, no such clear division is to be seen in the code of Manu, the highest authority on the subject." *Secondly*, because "the law relating to marriage—an important branch of every system of jurisprudence—is contained, not in the chapter on Vyavahara, but in the part treating of Acharya." And *thirdly*, because "Manu, in more instances than one, provides purely religious sanctions to enforce obedience to rules relating to civil life." K. L. Sarkar holds a contrary view and his opinion appears to be more sound and just; as regards the above, he says: "None of these reasons possesses great cogency. A formal division into *Acharya* and *Vyavahara*, no doubt, does not expressly appear in Manu as in Yajnavalkya, but it is sufficiently indicated in Manu as in all other Smritis. Then, as regards the question of marriage, it is of an exceptional character. In all countries and all nations, it has more or less a double aspect—a civil and a religious or social aspect. In the civil aspect, it constitutes a branch of the law of *status* which has some connection with the religious practices of people. Then again, as regards the question of the religious sanction, it has already been amply explained that the religious sanction from the Hindu point of view is something more than a mere moral sanction. It is believed to be something absolute and certain. Besides, the positive or Vyavahara law is based upon both the sanctions—punishment by the king as well as the religious sanction of transcendental consequences, whereas in matters of *Acharya*, there is only the ecclesiastical sanction of penance or none at all." Dr. T. N. Mitra in his Tagore Law Lectures also observes that Vijnaneswara clearly sets forth the distinction between the binding code and the rules of ethics, and points out this distinction with reference to the text of Yajnavalkya relating to the judicial duties of the king.

The principles of moral law are, in fact, so intimately connected with the principles of judicial law that at places it is very difficult to demarcate the two. It is not peculiar to this system of law alone. The judicial code is enlarged more and more by drawing upon the moral codes. Therefore, the equitable laws and case-laws are nothing more than illustrations of the point.

Looking at the history of Hindu Law, we find the various stages through which it has passed :—

- (1) Writing unknown ;—*Śruti* and *Smṛiti*.
- (2) Introduction of writing—Stage of written *Sūtras*.
- (3) Codification of laws
- (4) Buddhistic period.
- (5) Mahomedan period.

A brief history of the vicissitudes through which the Hindu Law had to pass from the dawn of society to the present time, will be helpful in following its juristic development and the importance of the *Mīmāṃsā* development, as it has always been independent of the State, or, in other words, it is not a State-made law. Various are the stages through which the Hindu Law has passed and its history is as old as that of the nation itself.

In the first stage writing was unknown, and that was so for a considerably long period in the history of the Hindu nation, rather the Indo-Aryan nation, as is evident from the terms "*Śruti*" and "*Smṛiti*" as applied to the religious tenets and the social rules respectively of this people. These terms show that the means of passing knowledge from one generation to another was by oral communication. The question may arise as to the difference between the two—the *Śruti* and *Smṛiti*, hearing and remembering. It would appear that in '*Śruti*', the matter was embodied in set forms of language, mostly in metres, which could be recited and sung. Elaborate rules, called *Śikṣā*, taught the mode of learning the Vedas by rote as well as the manner in which they were to be recited. It was quite a mechanical process. But in the case of '*Smṛitis*' language was of no consequence ; the substance of the matter was communicated by one to the other. Therefore, the one was a matter of speech, revealing the Divine law which admitted of no change, while the other was a matter of memory consisting of the floating traditions of custom and practice which exerted considerable influence on the conduct of society. It was on this account that the former was held superior in authority to the latter on the same point. Both grew up side by side, as appears from the same names of many

of the learned sages or Rishis being associated with the *Srutis* as well as the *Smritis*, such as Manu, Atri, Angas, *etc.*

The law was administered by the heads of clans and families, *i.e.*, the leading men of the Gotras and Pravayas, either personally or by an umpire selected by the parties. It was a period in which laws were in the making, their source being in the *Srutis*, the fountain-head of all law.

The second stage of Hindu Law commenced with the discovery of the art of writing. The *Srutis* or the *Manttras* (hymns) were reduced to writing in a much shorter period, but the *Smritis*; because of their being floating mass of information, took much greater time. Before they were reduced to writing in systematic treatises, their substance and some of the *Brahmanas* in the form of the *Sutras* were reduced to writing. So it may be called the age of written *Sutras*, and it appears very probable that the *Sutras* came into existence before the art of writing was discovered. Professor Max Muller in his book—*The Six systems of Indian Philosophy* (at page 6) says, "We have to begin our study of Indian Philosophy with the *Sutras*, these *Sutras* themselves must be considered as the last outcome of a long continued philosophical activity carried on by memory only." So he concludes that the *Sutra* period began when the period of the mnemonic Sanskrit literature ended.

The revealed law, though reduced to the written **Vedas** or scriptures, retained its old nomenclature '*Sruti*.' The *Smritis* were represented in the written *Grihya* and *Dharma* *Sutras*, such as those of Ashvalayana, Sankhyayana, Gobhila, Apastamba, Parasara, Baudhayana, and Vashishtha, *etc.* These *Sutras* were not very exhaustive, so the deficiency was made up by the third source of law—*vis*, custom and usage, as declared by Manu. The written law was, therefore, only half-formed, but was growing and was supplemented by the customary law. The distinction between the *Srauta* law and *Smarta* law was made in this period, the two going on side by side.

It was at this stage that the Manu *Smriti* appeared in the shape of Manava *Sutras* along with the *Grihya* and *Dharma* *Sutras*. Therefore, it cannot be doubted that the metrical versions of the several *Smritis*, in their codified forms in the shape of *Samhitas*, were subsequent to the *Sutra* stage. Even in this infant *Sutra* age of written law, rules of interpretation had become necessary and had been formulated more or less in the *Kalpa* *Sutras* of Ashvalayana and others.

With the advancement of the study of *Vedas* (*Swadhyaya*) which had given rise to a class of learned men, the learned class had a predominant share in the administration of justice. "The village-men,

the townsmen, assemblages of families, associations of artisans, and a scholar in the four sciences, persons belonging to the same clan, allied families, constituted judges, and the king are several Judicatories." [Bhrigu cited in *Smṛiti Chandrika*]. These constituted law courts administered justice from the *Srutis*, the *Srauti Sūtras*, *Grihya Sūtras* and the practices and usages then prevalent. The *Srauti Sūtras* regulated chiefly the acts of worship and sacrifices ; and the *Grihya* and *Dharma Sūtras* dealt with domestic duties and duties, between man and man.

In the third stage, owing to the amplification and enlargement of the Vedic and *Smṛiti* literature, there was felt the necessity of codification or *Samhita*. So the Vedas were embodied in the forms of the *Samhitas* and were classified, and their branches were elaborately exhibited. "A new departure was also made in the *Smṛiti* literature, from the *Grihya* and *Dharma Sūtras* to the *Samhitas* or institutes which were called the *Dharma-shāstras*. The Aryan power in the land had extensively increased, and many were the people and territories which were brought under the Aryan rule. Great kings and great kingdoms had come into existence, and the administration of justice had become an important factor in civil life. With these changes a demand for large and comprehensive institutes of law necessarily arose, and this demand was satisfied." These *Dharma-shāstras* were considered as binding treatises or text books on law and were not treated as literary production having no authoritative sanction.

With the development of law, the machinery for administration of justice, and rules of procedure also developed. Two sets of courts were formed ; firstly, courts constituted directly under the state authority ; secondly, courts of a popular character and constituted by the people themselves. A short description given by Colebrooke in his *Miscellaneous Essays* (pp. 401-2) as to these courts will not be out of place here :

"Places of resort for redress are :—

(i) "The court of the sovereign, who is assisted by learned Brahmins as assessors ; it is ambulatory, being held where the king abides or sojourns."

(ii) "The tribunal of the Chief Judge appointed by the sovereign and sitting with three or more assessors not exceeding seven. This is a stationary court, being held at an appointed place."

(iii) "Inferior Judges, appointed by the sovereign's authority for local jurisdictions ; from their decision appeal lies to the court of the Chief Judge, and thence to the Raja or King in person."

"Under the head of popular courts would fall the following :—

(i) **पुग**—"Assemblies of townsmen, or meetings of persons belonging to various tribes and following different professions but inhabiting the same place."

(ii) **श्रेणी**—"Companies of traders or artisans; conventions of persons belonging to different tribes, but subsisting by the practice of the same profession"

(iii) **कुल**—"Meetings of kinsmen, or assemblages or relations connected by consanguinity."

The technical terms in the Hindu Law-books for these three gradations of assemblies are :—

(i) Puga (ii) Sreni, and (iii) Kula."

"Their decisions or awards are subject to revision ; an unsatisfactory determination of the 'kula' or 'family' is revised by the 'Sreni' or 'company', as less liable to suspicion of partiality. From the award of the 'Puga' or 'assembly', an appeal lies according to the statutes of the Hindu Law, to the tribunal of the 'Pradvivaka' or Judges ; and finally to the court of the Raja, or Sovereign Prince."

Besides other qualifications, the knowledge of sacred law, including the rules of Mimansa, was an essential qualification for the assessors. Narada says, "The assessors of the King's Court of Judicature should be men skilled in sacred law, sprung from 'good families, rigidly veracious and strictly impartial towards friends and foes." As regards popular courts, Vashishtha says, "Four students (of the four Vedas), one who knows the Mimansa, one who knows the Angas, a teacher of the sacred law and three eminent men who are in three (different) orders, compose a legal assembly consisting of at least ten members." From the above it is evident that the paramount importance of knowledge of the rules of interpretation has been recognized from the earliest times.

In the fourth or the Buddhistic period, certain modification in the rules of administration were introduced owing to

Fourth Stage.

difference in the religion of the sovereign and the administrative authorities. It is not an easy task to determine the extent of the modification. That Buddhism interfered neither with Hindu Law nor with usages and customs, is evident from the fact that the Burmese Law Books are based on the code of Manu. The great founder Buddha allowed every liberty of thought and action, and his mission was to improve one's life and character, untrammelled by the fetters of dogmatism and conventionalism. The existing systems of Hindu popular institutions, such as village communities and assemblies, had their full play under the Buddhistic rule. The king's Court and

courts subordinate to it, continued to function as before and administered the Hindu Law of property. But some difficulty must have arisen by Buddhistic courts administering the Hindu Law, as the orthodox Brahmin assessors could hardly be expected to co-operate with them. This led to the compilation of a digest which was more or less free from the characteristic features of Hindu conservatism. It would appear that Viswarupa's commentary on Yajnavalkya, which was followed by Vijnaneshwara in writing the *Mitakshara*, was such a book. Therefore, *Mitakshara* which was written in this period, bears the impress of Buddhistic influence. Kishori Lal Sarkar, the learned Tagore Law Professor says (at p. 21) as regards the *impress of Buddhism on the Mitakshara*, "*Mitakshara* begins by discarding the fundamental principle taught by the Vedas, that property is for spiritual benefit, and that its devolution depends on considerations of such benefit alone. Then, again, the tendency shown in the code of Manu and most of the *Samhitas* is to allow free partition and devolution; certainly, there is nothing in them to tie up property; but the Baudhas, favouring monastic institutions, were naturally partial towards the principle of perpetuity. And the *Mitakshara*, too, characterises itself by favouring the same principle. Then, again, what can be the reason for the *Mitakshara* becoming the governing law for almost the whole of India to the exclusion of Manu's code with able commentaries on it? This would be hard to understand except by supposing that the Baudha king considered Manu's Code to represent orthodox Hinduism in a greater measure than the Yajnavalkya *Samhita*, as explained by Viswarupa, who was followed by Vijnaneshwara. They and their Hindu successors adopted this work for the guidance of their courts throughout their dominions, where it still prevails except in Bengal from which it was displaced by Jimutavahana, who apparently flourished after the complete revival of Hinduism. In this connection, it may also be noted that according to Webber (*Ind. Lit.*, p. 237), Yajnavalkya is virtually described in the *Mahabharata* as a Buddhist teacher."

"These are considerations which naturally lead one to think that Vijnaneshwara, the author of *Mitakshara*, might not have been an orthodox Hindu. He was an ascetic (*Sannyasi*). It is said, he was a disciple of Sankaracharya, as testified by Colebrooke. But there is no positive proof of this belief as has been shown by some writers [Nelson—*The Scientific Study of Hindu Law*, p. 84]. But that he was an ascetic is an admitted fact [Buhler *Journal Bombay, R. A. S. Vol. IX, No. XXV*]. For an orthodox Hindu *Sannyasi* to write a large book on law is not a usual thing, while one with a pro-Buddhistic tendency, might well do it. *Mitakshara's* treatment of the subject of succession

of Yatis and Sannyasis is characteristic. However, my justification for entering on this question is, that I shall have largely to consider the principles of interpretation adopted by the Mitakshara. And, it would help one to understand these principles better, if one can form an idea of the circumstances under which the code was compiled. A few more words are necessary to explain the influence which the Buddhistic rule had upon the Hindu Law and the mode of administering that law."

"Agnipurana is a treatise written after the Bauddha period; for, it refers to events connected with Buddhism. Chapters 252 to 258, both inclusive, of this Purana are devoted to the subject of law, the law courts and judicial proceedings. In chapter 253 (secs. 21 to 37) the constitution of the courts is described

much to the same effect as it has been described to exist during pre-Buddha period. This shows that there had not been much change made in this respect during the Bauddha period. But as regards the popular assemblies, it appears that during the Buddhistic rule, their scope and functions were considerably enlarged and their position more firmly established. This would become crystal clear from the following passages in Chap. 257 (secs. 38 to 47):—

"The man who would rob a public property, as well as the one who would dishonour and violate the decision of the public assembly of his country, should suffer an exile, and all his goods and chattels should be confiscated. All questions of public utility should be submitted for the decision of the public assembly (*Samuha Hitabadi*), and their decision shall carry the weight of law. Any one acting in **direct** contravention of such a decision, shall be liable to fine. A man deputed on a public errand by a public assembly and gaining anything in connection therewith should deposit the same in the public purse. In the alternative he should be liable to refund to the public exchequer eleven times of its value, if not voluntarily depositing the same."

"The executive committee of such an assembly should consist of men, pure in conduct, and well versed in the Vedas, and who would be above all greed and corruption; and the assembly should carry out their orders without the least questioning. The same shall hold good in the case of trade guilds, as well as in the guilds of artisans, or in the councils of men professing a religion, other than the established one of the country. The king should maintain the separateness of those trade-guilds, and encourage the public assembly of his realm."

It appears that all the branches of law, such as the law of property,

of contract and mortgage, of torts and crimes, of procedure, evidence, and limitation, *etc.*, had attained a sufficiently high degree of development which could, any day, compare favourably with the current Anglo-Indian law. The rules of interpretation were also placed on a more liberal basis as is evident from the Agni-Purana (Ch. 253, secs. 50 to 52) : "A principle of equity should be deemed as a better authority in the conflict of the tenets of law codes on a particular point." The resemblance between the law sections of the Agni-Purana and the Vyavahara Kanda of Yajnavalkya is striking.

The fifth and the last stage of the Hindu Law is that of the Mahomedan rule during the five centuries and a half of Mahomedan predominance throughout India.

Fifth Stage.

There is very little recorded information on the subject ; but the following works of the 16th century give much valuable information on the point : (1) Digest of Hindu Law called Narisinha Prasad by Dalapati, one of the ministers of the well-known Nizam Shah dynasty of Ahmednagar. (Its manuscript is available in the Sanskrit College Library, Benares.) (2) A similar Digest named Todarananda's Vyavahara Saukhyas containing law of Civil Procedure and the Law of Evidence. (The manuscript of its first section has been preserved in the Deccan College, Poona.)

Elphinstone says in his history of India (p. 484) : "By the original theory of the Mahomedan government, the law was independent of the State or rather the State was dependent on the law." The Mahomedan Government never interfered with the social usages and customs of the Hindus, and contented themselves with introducing changes in the revenue law of the country.

The Pathan kings introduced their own feudal system in the revenue code of India in the shape of the Zamindari institutions. The change brought about the disuse of the popular assemblies, but the village assemblies and village communities remained as before, and the administration of Hindu Law remained in their hands. Complicated cases alone were decided by the distinguished Pandits. But the Mogul system of administration of law in the words of Elphinstone, was "of the Qazis which recognised the Mahomedan Law alone and which acted on application and by fixed rule of procedure, and those of the officers of Government whose authority was arbitrary and undefined." The highest court was composed of Mir Adl (Lord Chief Justice) and a Qazi ; the latter conducted the trial and stated the law ; the other passed judgment and seems to have been the supreme authority. This tribunal used to try cases between Muslims and also cases between Hindus relating to contracts, torts, and crimes. As

regards cases involving questions of Hindu Law of property, they were left to the Hindus themselves and were decided by Pundits or Colleges of Pundits. Akbar, the Great, who had a greater liking for the Hindu than the Muslim religion, did not interfere with the Hindus except in the cases of trials by ordeal. The Dewani Courts generally decided cases relating to revenue, but in special cases where the Dewan was a Hindu he often decided cases between Hindus with the help of Pandits.

Thus, the Revenue law underwent changes and modifications. The Zamindars under the Pathan rule had their courts and as a consequence of the change the popular assemblies referred to above which existed down to the end of the Hindu period gradually disappeared, but the village assemblies and village communities survived. The Hindu Law was administered by village communities in simple cases, and in complicated questions by Pandits or colleges of Pandits. The historical summary of the Hindu Law given above clearly shows that the duty of interpreting the law was always in the hands of Brahmins conversant with the law, and they, in order that their decision might carry weight, were always bound to follow fixed principles of interpretation mainly derived from the highest authority, Mimansa Sutras. Therefore, the mimansa rules of interpretation have never been a dead letter. They were always a living principle even down to the end of the Mahomedan rule.

SECTION 2 SOURCES OF HINDU LAW

The sources of Hindu Law are: (1) *Śrītis* or the Vedas, (2) *Smritis*, or Dharma shastras, (3) *Sadacharas*, the established usages of good men, (4) *Atma-tushti* or self-satisfaction and (5) the *Puranas*. Out of these the primary or the principal source is the Vedas and its authority is based on direct revelation, while the authority of the Smritis is derivative. The conflict amongst the different Smritis is admitted. It is also evident that legal rules as well as moral and religious precepts are included in the broader conception of 'Dharma.'

The literal meaning of 'Dharma' is that which *supports* and *sustains*: for an individual, it sustains him through the temptations and vicissitudes of life; and for the community at large, it is the source of its solidarity. The Taittiriya Sruti has rightly declared, 'it is the support of the entire world,' धर्मो विश्वस्य जगतः प्रतिष्ठा । In the Vedic age of Hindu society, these rules of action were strictly adhered to and revered, as they were based on direct revelation. In the succeeding age of Dharma-shastras the sages claimed themselves to be the

Sources of Law.

The term, Dharma explained.

receptants of direct revelation, and justified their precepts as having been based on it. Jaimini, the author of the Mimamsa aphorisms has observed: "Revelation being the root of Dharma, whatever is not (directly or indirectly) based on revelation need not be attended to." धर्मस्य शब्दमूलत्वादशब्दमनपेक्ष्यं स्यात् । [Purva Mimamsa I. i. 3.] In spite of this implicit adherence to Shastric injunctions, human tendencies may dissuade people from following them. This idea must have suggested itself to our law-givers very early in the evolution of Aryan thought and brought forth the difference between the pleasurable and the good. Both these ideas—(1) foundation on revelation, and (2) conduciveness to true welfare, have been conveyed in the term "Dharma" by Jaimini who defines it thus: "Dharma is that object of welfare which is indicated by an injunction." चोदनात्मनोऽर्थो धर्मः । Kanada in his Vaisashik Aphorisms (*Sutras*) has also defined Dharma as the source from which welfare, and eventually salvation, are realised, यतोऽभ्युदय निःश्रेयससिद्धिः सधर्मः ।

Dharma, or sacred law, therefore, contains its authority within itself and even the king, like other human beings, is subject to it. The king has, in fact, to exercise a double function in the domain of sacred law, *viz.*, it is not only his duty to obey the law himself like other individuals, but also to enforce its obedience upon others. 'The Law is supreme; the will of the king is not its originator, and its sanction is not derived from any extrinsic or accidental agency, for it contains its sanction within itself in that certainty that obedience to law will lead to welfare and its violation to misery.' The Mimamsakas, dealing with the Philosophy of Law, did not introduce divine intervention for explaining the fruition of human actions; but maintained that there was an invisible force which existed even after the cessation of the action, bringing out the due result either in this life or the next. This

invisible force, which was termed "Apurva," has been very correctly explained by Colebrooke, who observes: "The subject which most engages attention throughout the Mimamsa, recurring at every turn, is the invisible or the spiritual operation of an act of merit. The action ceases, yet the consequence does not immediately arise; a *virtue* meantime subsists unseen, but efficacious to connect the consequence with its past and remote cause, and to bring about, at a distant period or in another world, the relative effect. That unseen virtue is termed *Apurva*, being a relation super-induced, not before possessed."

That portion of Hindu Law which may be characterised as positive law, differs from the other portions which deal with ceremonial rules and, moral and religious injunctions. The special function of the king

in the Hindu polity differentiates the two. The positive law may, therefore, be said to comprise that portion of the law, the violation of which, calls for the interposition of the king in order, to chastise the delinquent for his transgression. This punishment is enforced by the king for providing an adequate remedy to the injured party.

As Yajñavalkya (II. 5) has declared, "If a person, molested by others in a way which contravenes the Smṛiti or established usage, complains to the king, that gives rise to a topic for a judicial proceeding."

स्मृत्याचारव्यपेतेन मार्गेणाधर्षितः परैः ।

निवेदयति चेद् राज्ञे व्यवहारपदं हितम् ॥

SECTION 3. HINDU CONCEPTION OF LAW

Thus, the Hindu conception of positive law implies **three characteristic elements** : (1) transgression of law as laid down in the Smṛiti, or established by usage ; (2) injury to some one other than the transgressor ; and (3) intervention of the king in his judicial capacity. It was, therefore, not very different from the Austinian conception. It is the intervention of the king, who is the protector of the people and

Difference in the two conceptions.

the administrator of justice, that converts religious or customary law into positive law. According to Austin, law consists of commands issuing from the king, and the duty of enforcing the same is a self-imposed duty, while according to the Hindu Legal Philosophy law issues from a source superior to the king, *i.e.*, the Almighty God, and the duty of enforcing the same is cast upon the king, from above. The infliction of punishment or the carrying out of the injunctions of law is, therefore, regarded as Dharma, as declared by Manu, "Penalty keeps the people under control, penalty protects them, penalty remains awake when people are asleep, so the wise have recognised punishment itself as a form of Dharma."

दण्डः शास्ति प्रजाः सर्वार्थाः दण्ड एवाभिरक्षति ।

दण्डः सुतेषु जागर्ति दण्डधर्मं विदुर्बुधाः ।

[VII. 18.]

Therefore, according to the Hindu conception, proper administration of justice and maintenance of order was the principal duty of the king and not the collection of revenue. So Manu declares, "A king who without protecting his subjects collects revenue from them may be said to be that collector of all the impurities to which they are subject."

अरक्षितारं राजानं वलिषड्भागहारिणं ।

तमाहुः सर्वलोकानां समग्रमलहारकं ॥

[VIII. 308.]

Yajñavalkya has also observed to the same effect, "Whatever

sin the people commit being unprotected by the king, half of that goes to the king since he takes revenue from them." [I. 337]

अरक्ष्यमाणाः कुड्बन्ति यत्किञ्चित् क्लृप्तं प्रजाः ।

तस्मात् नृपतेरर्द्धं यस्मात् गृह्णात्यसौ करान् ॥

There is a difference of opinion as to the real nature of Hindu Law. An opinion has grown up among European scholars that the Hindu *Smritis* never embodies the actual laws current among the Hindus at any time, that all of them were not positive laws in the modern sense of the term, and that they, at best, resemble the modern treatises on jurisprudence embodying the ideal of law rather than actual laws themselves. This theory probably originated with Elphinstone who thought that Manu's Code, like Plato's Republic, represented an ideal commonwealth. In support of the above view, Sir Henry Maine observes regarding Manu's Code: "The Hindu Code, called the laws of Manu, is certainly a Brahmin compilation. The opinion of the best contemporary orientalists is that it does not as a whole represent a set of rules administered in Hindustan. It is in great part an ideal picture of that which in the view of the Brahmins ought to be the law." West and Buhler in the introduction to their Digest of Hindu Law say as follows: "The older *Smritis* and the originals of the rest are not codes but simply Manuals for the instruction of the students of the *charans* or schools." And Fankin, J., in his judgment in a famous case (19 W. R. 403) has expressed his opinion to the same effect.

The critics seem to have come to the above conclusion because, probably from an examination of the codes, they found that they contained divergent rules, some being very harsh while others very light; considering the nature of the offences, some provisions being very puerile, others only rules of morality, and still others apparently self-contradictory. From this picture of seemingly incongruities and self-contradictions the modern critics arrived at the conclusion that the codes never constituted an actual set of positive law for the government of the territory to which they appertained.

But numerous Indians and some English scholars too have maintained that the Hindu Codes had a binding character in the same fashion as the law in modern times has. They explain the apparent contradictions thus; that most of the codes have not come down to us in their entirety and that most of them survive in a fragmentary and mutilated condition. As regards codes that are to a certain extent intact, the state of society for which they were intended, has long since changed considerably. Again we are apt to make our present notions of law, morality, government, *etc.*, as our standard of comparison.

The opinion, therefore, of modern critics is directly opposed to the Hindu notions of these Smritis, and it cannot be gainsaid when we remember the fact that in the Hindu society, traditions have a remarkable continuity embodying truths about the state of the society. Of course, there are certain provisions which are declared inapplicable to the present or *Kali* age, and for this there is authority even in the Smritis themselves which expressly declare that certain rules are not to be observed in the *Kali* age. Again, the remarkable agreement between the different Smritis would lead one to believe that the Smritis embody laws which were obtained amongst the Aryans in their first home in Hindustan or in their ancient home outside the limits of Hindustan.

Moreover, that the Smritis were codes of law and not treatises on morality will appear clearly from the following passage in the Smritis of Yajnavalkya, "The king should investigate judicial proceedings conformably to the sacred codes of law." The sacred codes here refer to the Smritis. Vijnaneshwar in his commentary emphasises the passage "not according to ethical law", thereby clearly showing that the codes of law or Smritis are different from the ethical codes, and the king is enjoined to decide not according to ethical codes but according to sacred codes of law. The next passage of Yajnavalkya occurs in Mitakshara Ch. II: "It is a fixed rule that the sacred code is of greater authority than the rules of ethics" and the commentary on the passage mentions "ethical codes such as those compiled by Usan and others," and further lays down that "where sacred and ethical codes are at variance, the former is more authoritative than the latter. This is the established rule of definition." Of course, at this distance of time it is very difficult to point out correctly which are the sacred codes of law and which are the codes of ethics, but the distinction was perfectly clear to the ancient writers on law. The sacred codes were confined to the writings of the selected few as named in Yajnavalkya Smriti. This, then, is the effective answer to the critics of Hindu Law.

As regards the opinions of the English scholars that Smritis are *not actual codes of law*, there is, however, a conflict. Sir W. Jones, Burnell and Dr. Jolly incline to the opposite view. Burnell speaking of the Smritis says, "A great difference between the original Smritis is apparent, but there is no reason for us to believe that these works don't represent the actual laws which were administered."

But before we try to fit in the conception of Hindu Law to the modern or Austinian conception, we should modify the latter so as to adapt it to Hindu Law. According to Austin, "The body of law is an aggregate of commands from political superiors to their inferiors.

According to him, it is the body of commands issued by the rules of political society to its members whom lawyers call by the name—law. Under Hindu Law the place of these political superiors so far as law was concerned was taken by the Smriti writers such as *Gautam*, *Apastamba*, *Yajnavalkya* and *Muni* who, under the authority of the spiritual brotherhoods of ancient India, enacted laws binding upon the members of those societies. These religious groups of men exercised the power. Sovereign powers were vested in them, and law promulgated under their authorities governed all members of the associations. We have, moreover, evidence to show that Gautam, Baudhayana and Apastamba were the original founders of fraternities and were themselves presidents of small republics, whose word was law and who paid homage and fealty to the president of political association who was virtually the sovereign of the political society. "Thus Hindu Law is not merely a phantom of that brain imagined by the Sanskritist." Hindu Law does exist and has existed for upwards of at least 3,000 years and has governed the Hindu community in the same sense in which Statutes of British Parliament govern the subjects of Great Britain.

CHAPTER II

LAW OF PERSONS

(A) LAW OF SPECIAL STATUS

SECTION I. LAW RELATING TO MARITAL AND QUASI-MARITAL RELATIONSHIP

From the juristic point of view the study of law may be classified as follows : (1) law relating to **persons**, in whom a bundle of rights constituting ownership inheres in relation to particular objects ; and (2) law relating to **things** as subject to a special kind of control from particular individuals, so that those things would be deemed as the property of those individuals. We will first deal with the law relating to persons involving the consideration of various rights and obligations which arise between two or more persons by reason of their being related to each other, the relationship being of durable character, giving rise to what is known as 'status' or legal condition as distinguished from rights and obligations entirely regulated by mutual agreement which terminate when those rights or obligations are fulfilled.

The history of the Hindu Law of marriage is very complicated. It appears from the Mahabharata that in certain cases women were treated like chattels until Svateketu, son of sage Uddalak, introduced the institution of marriage (Mahabharata Adi-Purana Ch. I, 122, 147, p. 2). The next stage was that of polyandry and polygamy, the traces of which are in the Rig-Veda. At the time of its compilation, the institution of marriage was an established fact, and monogamy was the rule of the day. Polygamy, however, was also recognised, if allowed by custom. Marriage was as a rule customary, as no bachelor or widower could perform the rites enjoined by religion. The Vedic marriage was one among adults, and the wife selected her own husband (Mahabharata Vol 6, p. 150). The position of the wife was that of a chosen friend and the sole ceremony consisted of joining their hands before the sacrificial fire. The different stages through which society gradually passed introduced different forms of marriages with different rituals, described below.

The first in point of time was that of procuring a wife by force, fraud or enticement, which betrays the varying degree of civilisation.

Different forms of marriage.

Paisacha was the marriage of a girl with a man who had committed the crime of ravishing her either when asleep or drunk by administering to her an intoxicating drug.

1. Paisacha.

It should not be considered that fraud was legalised by Hindu Law, but the recognition of this form of marriage was due to the fact that chastity and monogamy were valued the most, and so the ravisher was allowed to marry the girl deflowered by him. The second was the *Rakshasha* form, which was marriage by forcible capture and was permitted only in

2. Rakshasha.

the case of the Kshatriyas or military classes. This form of marriage is still prevalent amongst the Gonds (a) of Berar and Batul (b). The third form, the *Gandharva* marriage was the union of a man and a woman by mutual consent.

3. Gandharva.

In modern sense, it may be styled as concubinage. It related to cases where either there was no guardian of the girl, or where consummation by mutual consent had already taken place, and the law required that the father of the girl, if alive, should give his assent to the marriage under the circumstances. This form has now become obsolete (c), but it is still in vogue in some places and it has been held that some sort of nuptial ceremonies are essential in such a marriage (d). Both those forms of marriages were considered lawful for the warrior classes (e). These three forms point to a time when the rights of parents over their daughters were not recognised or were disregarded, and when men procured women for themselves by force, fraud or enticement.

The remaining forms of marriage came into vogue when the dominion of the parents over their daughters was fully recognised, and the essence of the marriage consisted in a formal transfer of this dominion to the husband. The next in order of time is the *Asura* or

4. Asura.

marriage by purchase which amounted to a virtual sale of the daughter (f). It was condemned by Smritis (g). The *sulka* or the bride-price was the consideration of the gift to the father, of the daughter in marriage (h). When there was pecuniary benefit to the giver of the girl (i) the marriage would be deemed to be one under the *asura* form, even though the rites

(a) They are not Hindus unless they are proved to be so. *Sarjabai v. Ganga Ram* 1930 Nag 33.

(b) *Garab Singh Gond v. Emperor* 1927 Nag 279

(c) *Bhaoni v. Maharaj Singh* 3 All. 733 See also *Viswanatha Saamy v. Kannu* 24 M L J 272, 21 I C. 724.

(d) *Devidayana v. Radha Manu* 12 Mad. 72. See *Banda v. Shastri* 24 C.W.N. 558, 51 I C 582.

(e) *Manu* III, 26.

(f) *Ghansilal v. Surajram* 33 Bom. 433, 438 : *S. Anthesadulu v. S. Ramanujam* 32 Mad 512; *Hira v. Hasya Pema* 37 Bom. 293, 17 I. C. 949, 14 Bom. L. R. 1182. See *Ratnakant v. Sundara Mudaliar Soma* 62 I C 931, 41 M. L. J. 76, 13 M. L. W. 582, 1921 Mad 608, 1921 M. W. N. 633.

(g) *Manu* III, 41.

(h) *Govind v. Savitri* 43 Bom. 173. See *Shambhu v. Nand Kumar* 38 I C. 963, 23 O. C. 284.

(i) 33 Bom 433, 437, 12 Bom. L. R. 708, supra.

prescribed for the Brahama form might have been gone through. Any substantial contribution towards the expenses of a marriage by the bridegroom would be treated to be the consideration of marriage to the bride (*j*), and the marriage would be one under Asura form. But the presents of ornament, jewels, *etc.*, by the bridegroom to the bride at the time of marriage (*k*) or marriage by exchange, *i.e.*, where a girl of one family is married to a boy of another family and *vice-versa* (*m*), or where a small sum is paid by custom not to the father but to the mother, would not be deemed to be the bride-price (*l*), and would not constitute the marriage as one in the Asura form. Thus this form of marriage, *i.e.*, by purchase, became necessary when it became impossible to obtain women by stealth or force. Manu says (*n*), "Let no father, who knows the law, receive a gratuity, however small, for giving his daughter in marriage, since the man who, through avarice, takes a gratuity for that purpose is a seller of his offspring." These four forms of marriages were regarded as bad and undesirable. The following *four* were *approved forms*: In *Arsha* form, the bridegroom made a present of a pair of kine to the

5. *Arsha*.

bride's father which was accepted for religious purposes only. The substantial consideration was, thus, reduced to gift of small value (*o*) and so it was simply a nominal survival of the Asura form.

In *Prajapatya* form, the bridegroom was the suitor for marriage;

6. *Prajapatya*.

he might not be a bachelor and the gift of the girl carried the condition that the two were to be partners for performing secular and religious duties. In *Daiva* form

7. *Daiva*.

the girl was given in marriage to one who officiated as a priest in a sacrifice performed by the father of the girl, in lieu of the *Dakshina* (fee) due to the priest. In *Brahma*

8. *Brahma*.

form, the father or the guardian of the girl had to make a gift of the girl adorned with dress and ornaments to a bachelor well-versed in the Brahma or Veda, and of good character. He was sought out and invited to accept the gift. This form of voluntary gift was treated to be the best form of marriage which was not actuated by any gain whatsoever. It has been observed by the Allahabad High Court in a recent case that even a widow can re-marry according to Brahma form of marriage (*p*).

(j) *S Samu Asars v. Anachi Ammal* 49 M L J 554, 22 L W. 462, 1926 Mad. 37.

(k) *Gabrielnathaswami v. Valluamma* 53 J. C. 423, 26 M. L. T. 348 1920 M. W. N. 158, 10 M. L. W. 492, 1920 Mad. 884.

(l) *S. Aulikhesavulu Chetty v. Ramanujam Chetty* 32 Mad. 522, 327.

(m) *Punjabrao v. Atmaram* 87 I. C. 1018, 1926 Nag. 124.

(n) *Manu* III, 25 and 51, 98, 100.

(o) *Manu* III, 29, *Yajnasalkya* I. 59.

(p) *Mt. Kishen Des v. Shoo Paltan*, 1926 All. I. 23 A. L. J. 981, 90 I. C. 358, 48 All. 126.

The binding form of marriage was a sale under the ancient law. The symbol of sale in a marriage was preserved by the receipt of a gift of real value such as a chariot and a hundred cows which was later returned to the giver. Apastamba says that this arrangement was prescribed by the Vedas in order to fulfil the law (q). This present was ultimately received by the parents of the girl for the benefit of the bride and became her **dowry**. Manu says (r), "When money or goods are given to damsels, whose kinsmen receive them not for their own use, it is no sale; it is merely a token of courtesy and affection to the brides." This gift, called *sulka* passed in a peculiar course of devolution to the woman's own brothers and not to her female heirs, and so her family had special right over it; the possession was abandoned but the reversionary rights were maintained (s). When the girl passed the age of maturity, the bridegroom was not to give a nuptial present to her father owing to the loss of his dominion over her. As regards the present to the bridegroom, unfortunately the practice of extorting money from the father of the bride at the time of marriage is rampant in modern times, although it did not seem to have prevailed in old days and is an innovation of these times.

The elaborate symbolism which constitutes the Shastric marriage is a later development born of the *sutra* period (t). But the Grihya Sutra even then enjoined that the usage of the country should be followed in marriage (u). "The Vedic age was the age of courtship and marriage, but the growth of caste with its inter-caste jealousy, aided by the sacerdotal puritanism, established the institution of early marriages which tendency became aggravated in later ages, as the doctrine received support from the popular cry—"Give the girl no chance to go wrong." (v)

The conception of marriage assumed the sacred character amongst the Hindus as early as the Rig-Veda, which speaks of the married couple as associates in the performance of religious ceremonies, as is evident from the fact that Yajnas had to be performed by man and wife together. The later Vedic Sutras also show that the wife was in charge of the sacred fire and when she died she had to be burnt with that fire and the sacrificial implements. The widower could then take another wife. Polygamy was not permissible according to the spirit of law, and the second wife could not be associated in religious sacrifices,

(q) Apastamba II, vi.

(r) Manu III, 54. See in the goods of *Nalheba* a Bom. 9.

(s) Mayt 170, Mayne 96. 9th Ed.

(t) Mandlik's H. L., p. 401.

(u) Grihya Sutra 1-7, p. 25.

(v) Dr. Gour's Hindu Code, p. 108.

though it was the general practice. Polyandry was unknown amongst the Aryans and the only solitary instance is that of the Pandavas. (See Mahabharata).

Regarding the law relating to family relations amongst the Hindus, Mayne (at p. 73) says:—"No part of the Hindu Law is more anomalous than that which governs their family relations. We find a law of inheritance, which assumes the possibility of tracing male ancestors in an unbroken pedigree extending to fourteen generations, while coupled with it is a family law, in which *several admitted forms of marriage are only euphemisms for seduction and rape*, and in which twelve sorts of sons are recognised, the majority of whom have no relationship to their own father." By this, he means that the recognition of inferior kinds of marriages which legalized force or fraud never created any permanent relationship between the man and his so-called wife and this fact made it difficult to trace out male ancestors in an unbroken pedigree extending to fourteen generations. But it is a sad mistake on his part to assume things in this manner.

In the *first* instance, inferior sorts of marriages were tolerated and allowed with the sole object of maintaining the chastity of a girl and not with the object of legalising force or fraud. And, *secondly*, the very basic idea of a Hindu marriage was the creation of a permanent tie, whatever, the form of marriage might be. As observed by *Madhavacharya*, "It must not be supposed that in these disapproved forms of marriage beginning with Gandharva, the relationship of husband and wife does not arise for want of the ceremonies of marriage, including

Religious ceremonies essential in all the forms of marriages.

the taking of seven steps, because although they do not take place at the outset before acceptance, afterwards they are invariably performed." It has been clearly laid down by the sages that it was essential to perform religious ceremonies whatever the form of marriage might be, so it never created a temporary relationship as understood by Mayne, and thus it would not make it incompatible with the tracing of male ancestors in an unbroken line. It was but in the fitness of things that the wrong-doer was forced to take the girl as his wife after performing marital rites as

When marriage invalid in Hindu Law.

then only would she be free from all guilts, concerning her chastity and morality. Vashishta and Baudhayana have, therefore, declared, "When damsel is carried away by force, but is not solemnly married according to religious rites, she may be duly given in marriage to another, for there she remains a virgin as before." दामकस्यै तु न भार्यात्वम् । अतएव

वशिष्ठ वौधायनौ वनादपहृता कन्या मन्त्रैर्यदि न संस्कृता । Moreover, Hindu Law inflicts severe punishment for such crimes. The marriage under these circumstances would be invalid.

Out of the eight forms of marriages, as enumerated above, the **Brahma and Asura only prevalent.** *Brahma* and the *Asura* forms are only prevalent now, and the others are obsolete (a). Marriage in either of these two forms consists of two stages, *vis.*, a gift and acceptance of the bride in marriage, and the performance of certain religious ceremonies. The performance of the religious Shastric ceremonies alone could complete a marriage. The mysterious force of the Shastric ceremonies alone could bring out a sort of spiritual union between the husband and the wife. So Manu has laid down, "The recital of holy text in connection with the joining of the hands of the bride-groom and the bride determines the growth of marital relationship. These should be deemed by the learned to attain finality in the taking of the seven steps."

Therefore, according to the Hindu conception, marriage is a sacrament, and not a mere contract as in other systems of jurisprudence

पाणिग्रहणिका मन्त्रा नियतं दारलक्ष्णं ।

तेषां निष्ठातु विज्ञेया विद्वद्भिः सप्तमे पदे ॥ [Manu, VIII. 227]

There are certain other forms of marriage besides those enumerated

Other forms. above, which are also prevalent in India and are regarded as valid by custom (b) and by statutes

(c). *Anand* (d) and *Chadar Anandasi* forms of marriages are prevalent in the Punjab; the latter is not an approved form (e). *Karav* form of marriage is in vogue amongst lower castes in the North-Western Provinces. In Bombay, there is a form of marriage in which the wife is called *Natra* wife (f). *Pat* marriage is prevalent in certain parts of Bombay and the Central Provinces (g). *Patni* form of marriage is prevalent among a sect of Bairagis of Bengal (h) by exchange of Kathis (i). Among some lower castes in Bengal *Shunga* or *Sagai* form of marriage is well-known. Amongst the Kshatriyas of Southern India *sword-marriages* are very much prevalent still, now especially amongst the zamindars (j).

(a) *Maharaja of Kolhapur v Sundaram* 1923 Mad. 497, 48 Mad. 1, 93 I. C. 705.

(b) *Mt. Kushan Devi v. Shoo Pallan* 48 All. 126, 23 A. L. J. 581, 90 I. C. 358, 1926 All. I.

(c) Hindu Widow Remarriage Act. XV of 1856, Special Marriage Act XXX of 1923.

(d) *Sohan Singh v. Kabla Singh* 10 Lah. 372, 1928 Lah. 706, 112 I. C. 593, 29 P. L. R. 423, 10 L. L. J. 348.

(e) *Gurdai v. Bhagwan* 8 Lah. 366 371, 1927 Lah. 441, 101 I. C. 830, 28 P. L. R. 790; *Sohan Singh v. Kabla Singh*, supra.

(f) In re *Sama Jetha* 54 Bom. 348, 1930 Bom. 348, 127 I. C. 179, 32 Bom. L. R. 764, 31 Cr. L. J. 1157.

(g) See *Mani v. Zaboo* 22 N. L. R. 134 1924 Nag 488.

(h) *Aduwala Das v. Lohi Mohan* 33 C. W. N. 957, 1930 Cal. 37, 121 I. C. 413.

(i) *Gopal Jans v. Broja Mohan Swami* 34 C. W. N. 944, 1931 Cal. 103, 130 I. C. 230.

(j) *Maharaja of Kolhapur v. S. Sundaram Ayyar* 1925 Mad. 497, 48 Mad. 1, 93 I. C. 705. (Parties Sūdras, sword-wife held to be permanently kept concubine).

Besides gift, its acceptance and the performance of the religious ceremonies, there are also certain other considerations for conditions of a valid marriage. Some of these appear to be prudential admonitions and warnings against evil consequences. For example, the following text of Manu [III. 6, 7] be cited : "In taking a wife, let him (husband) avoid the following *ten* families; be they ever so great or rich in kine, goats, asses, money or grain, *viz.*, one which neglects the sacred rites, one in which no male children (are born), one in which the Veda is not studied, one the members of which have thick hair on their body, and those which are afflicted by hemorrhoids, plithisis, dyspepsia or white or black leprosy."

महान्यपि समृद्धानि गोऽजाविधनधान्यतः ।
 स्त्रीसम्बन्धे दशैतानि कुलानि परिवर्जयेत् ॥
 हीनक्रियनिष्पुरुषं निश्छन्दो रोमशार्शसम् ।
 क्षयामयाव्यपस्मारिषिव त्रिकुष्ठिकुलानि च ॥

According to Kulluka, a contravention of one or more of the above directions may not entail the negation of marital relationship. But there are other rules which, when contravened, may affect the validity of marriage and which, therefore, are important from the juristic point of view.

The text of Vishnu, *viz.*, one should not marry a wife within the same *gotra* or having the same *pravara* न सगोत्रां समानप्रवरां भार्यां विन्देत्, has been interpreted by commentators as a *pariyudasa* (excluding clause), the result of which is that the contravention of this rule will invalidate the marriage. This restrictive rule regarding the prohibition of marriage within the same *gotra* or between families having the same *pravara*, applies only to the twice-born classes and not to the Sudras who have no *gotra* of their own. But in Bengal the Sudras claim to have *gotras*; so under the Brahmanical influence, this restriction is applied. Even amongst the twice-born castes where the Brahmanical influence was not so great and forceful, this rule was often violated (*k*). Whatever the special circumstances may be, such transgressions of distinct Shastric injunctions are not permissible.

II. Prohibited degrees in marriage.

There is a great difference of opinion amongst the sages as well as the commentators as regards the prohibited degrees in marriage, but still there is a last limit, the transgression of which, would make the marriage itself invalid under the general principle of interpretation.

The position of women amongst Hindus has thus been explained by Manu, "While young she remains under the control of her father, after marriage under the control of her husband and, on his death, under the control of her sons; she does not deserve complete independence at any time."

Position of women.

पिता रक्षति कौमारे भर्ता रक्षति यौवने

पुत्रस्तुस्थविरे भावे न स्त्री स्वातन्त्र्यमर्हति ॥

रक्षन्ति स्थविरे पुत्रा इत्यपि पाठः ।

[Manu IX, 3]

रक्षेत् कन्यां पितावित्तां पतिःपुत्रास्तु वार्द्धिके ।

अभावे ज्ञातयस्तेषां नस्वातन्त्र्यं क्वचित्स्त्रियाः ॥

[Ya]. I. 85]

So the position of women in Hindu society is one of spiritual dependence on males; but at the same time males also could not perform religious ceremonies without the conjunction of their wives.

It is specially meant as a measure for their protection, for they are inherently weak and unable to withstand the troubles and turmoils of the world. "The good fortune of the family rests in them for they keep up the line, all honour is due to them; they are the lights of the household, the females are the fortune of the household—there is no distinction between the two."

प्रजनार्थं महाभागाः पूजार्हा गृहदीप्तयः ।

स्त्रियः श्रियश्च गोहेषु न विशेषोऽस्तिकश्चन ॥

[Manu IX, 26]

This aspect of dependence of women, therefore, does not impart any idea of degradation. Husbands have limited power over the persons of their wives. Nilkantha denies that the husband has ownership over the wife, though Vijnaneshwara says that he has.

Husband's power of gift or sale of his wife. Yajnavalkya and other sages enumerate a wife amongst objects unfit to be given. It may be due to the fact that the husband is not deemed to have

any ownership over his wife according to the theory of Nilkantha, or that the Shastras, even assuming that he has such an ownership, prohibit such an act. Manu has also declared that the wife cannot be detached or abandoned, which means that the marital-tie cannot be severed in any way, as it is indissoluble by its very nature.

न निष्क्रयवितर्गाभ्यां सत्सुभार्या विमुच्यते ।

[Manu IX, 46]

Hence, the Hindu Law does not recognise divorce. It is also laid down that it is a crime to abandon a guiltless wife, and the act is punishable. Even in case of faithlessness, the law makes a provision that she must be given a bare pittance for her subsistence. When she

is faithful, she is not only entitled to maintenance, but, in case she is abandoned, the husband would be directed to take her back, and in case of non-compliance, he would be made to give her a third of his fortune ; but when owing to the husband's poverty it be very hard on him to do so, she may be provided only with proper maintenance. .

It is the duty of a Hindu wife to remain obedient and faithful not only during coverture, but even after her husband's death. Our law-giver, Manu, has distinctly laid down that re-marriage of a widow is not permissible—'A second husband of a good woman is nowhere prescribed.'

Widow re-marriage.

न द्वितीयश्च साध्वीनां कचिद्भर्तापदिश्यते ।

[Manu V, 262]

एवं च सति पुनर्भूत्वमपि प्रतिषिद्धमिति ।

[Kulluka]

Kulluka also comments on this text that the second marriage of a woman is prohibited. Pandit Iswarachandra Vidyasagar and others following the text of Parasara contended that the widow marriage is permissible—"Another husband is ordained of women in five calamities, namely, if the husband be *unheard* of, or be dead, or adopt the order of an *ascetic*, or be *impotent*, or become an *outcast*."

नष्टे मृते प्रव्रजिते क्लीबे च पतिते पतौ ।

पंचस्वापत्सुनारीणां पतिरम्यो विधीयते ॥

[Parasara IV, 28]

The opponents of the widow re-marriage maintain that the text does not refer to the re-marriage of a woman who had been duly married, since Manu has declared that the re-marriage of a widow had never been spoken of in the ordinances about marriage, न विवाहविधायकं विधवा वेदं पुनः । but it only refers to a case where there has been a mere betrothal not followed by the performance of the ceremonies which alone complete the marriage. Moreover the prohibition contained in the Adi-Purana shows that this practice is prohibited in Kali age.

ऊहायाः पुनरुदाहं ज्येष्ठांशं गोवधं तथा ।

कलौ पंच न कुर्वीत भ्रातृजायां कमण्डलुम् ॥

Lastly, the view of Parasara or Narada cannot prevail over that of Manu who has expressly prohibited widow re-marriage. The sanction of Narada who has laid down positive law, only shows that the practice should not be punished by the king, but that it may be treated as consistent with the sacred law.

On the other hand, the advocates of widow re-marriage contend that the laudation of virtues of a chaste widow simply sets forth an ideal but never implies a prohibition, and as Parasara has expressly

laid down permissive law for the Kali age, his view must be held authoritative. The text of Manu never contemplated prohibition as in that case the passage (IX, 175, 176), 'When a woman being forsaken by her husband, or becoming a widow voluntarily marries again and gives birth to a son, that son is called *Pannarbhava* (or the son of re-marriage); if she takes the second husband when her first marriage was not consummated, or really returns to the first husband after having gone over to another, then with him the marital ceremonies may again be solemnised', would become irreconcilable. Whatever the arguments that may be adduced for or against the view, it can be safely said that the system of widow re-marriage has never been prevalent amongst the Hindus, specially amongst the higher castes, and the widows were enjoined to live a life of celibacy. G. S. Shastri (at p. 183) lays down the following grounds on which the rule against widow re-marriage is justified : (1) Women, as constituted by nature, can control and repress

Justification of the rule.

the sexual propensity, but men cannot ; (2) the number of women is larger than men ; (3) there are, no doubt, young widows in Hindu society, but there are not old maids, such as there are in European society ; (4) the Hindu system is characterized by justice and equity to women, *all* of whom are once married, and they must blame their ill-luck but not society, should they lose their husband, for they cannot justify a claim to have another husband, as in that case so many maidens would be compelled to remain unprovided with husbands ; (5) re-marriage of women undermines the foundation of female chastity, which is the *sine qua non* of the bond, peace and happiness of home ; (6) the utility of the institution should be tested by the good secured to the whole society, for the well-being and welfare of which, individual interests are often sacrificed.

The Hindu wife can be held liable for the debts incurred by her husband only when she acknowledges the liability and takes it upon herself, or when she is a joint debtor with her husband, otherwise she is not liable at all, as laid down by Yajñavalkya :

Liability of wife for husband's debts and vice versa.

प्रतिपन्नं स्त्रिया देयं पत्या वा सद्व्यत्कृतम् ।

स्वयं कृतं वा यद्वयं नान्यत् स्त्री दातुमर्हति ॥

[Yaj. II. 49]

Similarly, the husband also cannot be held liable for debts incurred by the wife, unless the same were for family purposes. An exception is, however, made in the case of tradesmen who cannot carry on their business or trade without occasional financial help from their wives out of their *stridhana*,

Hindu Law allowed females to hold or own separate property. The property which the husband gave to his first wife, as a sort of *solatium*, at the time when he took another wife, was known as **आधिवेदानिक** *Adhivedanika* and could be held by her. Besides this, she could acquire property by other means. There are texts of Manu which lay down that the husband can exercise some control over such property, but Hindu society has not imposed any bar in this respect.

The Mitakshara (Ch. II, Sec. XI, 203) has classed all such kinds of property belonging to a woman as her "Stridhana," but the Dayabhaga (Ch. IV Sec. 1, 18.) and others have used the term in a restricted sense as denoting only that class of a woman's property which she has the right to give, sell or use independently of her husband's control. Katyayana has laid down that "The wealth which a woman earns by the exercise of her skill in mechanical arts or receives as affectionate presents from persons not related to her becomes at once subject to her husband's control." (Katyayana cited in Dayabhaga)

प्राप्तं शिल्पेस्तु यद्वित्तं प्रीत्याचैव यदन्यतः ।

भर्तुः स्वाम्यं भवेत्तत्र शेषस्तु स्त्रीधनं स्मृतम् ।

Jimutavahana has expressed that the husband has a right to take it although he may not be in need or distress. The reason why Hindu Law allows an exclusive control over these two kinds of property is very clear, reasonable and just, as in these cases she earns wealth at the sacrifice of her duty to her husband, and in case of gift from strangers with whom she has no concern, her undesirable inclination to seek the good will of others may be more animated. While, on the other hand, in case of affectionate presents received by her from her husband or parents or their relations, known as *Saudayika* **सौदायिक** she has an absolute control over them with this exception, *vis.*, that in case of immovable property received as a gift from the husband she has no right of alienation, not only so long as the husband is alive, but even after his death, unless, of course, the husband himself chooses to invest her with such a right by express declaration to that effect (a). Sulkā or the gratuity for the receipt of which a girl is given in marriage and the profits **लाभ** accruing from other properties belonging to her are absolutely at her disposal and constitute a part of her *peculium*.

(a) Sen's Hindu Jurisprudence, p. 285.

A woman is the absolute owner of her peculium, and can dispose of it in any way she likes, except in case of the gifts by her husband. She is not absolutely independent in the last mentioned case, so it is doubtful whether she can alienate it without the consent of her husband, at least in the case of immovable property. Katyayana (cited in Viramitrodaya) declared, "Gift, pledge, sale of fields, houses, or slaves, made by dependant persons, does not become perfect without the assent of those on whom they are dependent."

Wife's right of alienating it.

न क्षेत्रगृहदासानां दानाधमर्णविक्रयाः ।

अस्वतन्त्र कृताःसिद्धिं प्राप्नुयानुवर्णिता ॥

Another text of Katyayana (cited in Dayabhaga) clarifies the meaning of this text where he says, that in regard to *Saudayika* property the independent control of women is ever acknowledged both in respect of donation and of sale according to their wishes even in the case of immovables.

सौदायिके सदा स्त्रीणां स्वातन्त्र्यं परिकीर्तितं ।

विक्रये चैव दानेच यथेष्टं स्थावरेष्वपि ॥

On a proper construction of these texts, it can be safely said that the husband is not entitled to withhold his consent with respect to *Saudayika*, if the disposition is a free act of the wife, not tainted with any force or fraud.

Generally speaking, the husband has no right to take any part of his wife's peculium without her consent. If he does so, he is liable to return it together with interest and in case of default his action is punishable ; and when he takes it with her consent, he is to return the same, but without interest. In case of her supersession, by his taking another wife, the king shall force him to restore the same, and her rights to maintenance would not be affected in any way. When the husband has no means of subsistence, as in famine or other distress, then alone he can use or take his wife's property without her consent. So it is only in such exceptional cases that his incapacity is removed. This fact is firmly supported by Yajñavalkya, "Husband is not liable to make good the property of his wife taken by him in a famine or for the performance of some indispensable duty, or during illness or while under restraint (for the payment of a debt or the like)."

One of the legal consequences of the marital union is that the wife becomes a co-owner with her husband in all his belongings. It has been discussed by commentators that this right of co-ownership of

Wife's right over husband's property.

the wife arises without in any way interfering with the full ownership of the husband, and ceases with the extinction of that ownership. Moreover, this right does not fetter the right of the husband in any way, nor does it invest the wife with any right of an independent control. The Mitakshara explains, the purpose of this text of Apastamba declaring this co-ownership, that in case of her husband's absence she gets the right to expend it for occasional acts of charity or the like and she gets an equal share along with the sons in case her husband distributes the wealth at his will. **मिताक्षरा ऋणादानप्रकरणं ।** So it is evident that though at first-sight this right of co-ownership seems nominal, it allows the wife important advantages.

As regards the right of polygamy among the Hindus, one school of thought held that it was not optional with the husband to take as many wives as he pleased, but his choice was restricted to certain conditions, such as the barrenness of his first wife or her giving birth to merely female children, and so forth, as enumerated by Manu [IX, 81].

Polygamy In Hindu Law.

वन्ध्याष्टमेऽधिवेद्याब्दे दशमे तु मृतप्रजाः ।

एकादशे स्त्रीजननी सद्यस्त्वप्रियवादिनी ॥

But the opponents of the above view, on the other hand, contend that the grounds for a subsequent marriage, as laid down in the texts, may be regarded as merely justifying the causes, but could not be taken to control the right of a man to contract such a marriage. There are many indications in the Manu Smriti as well as other Dharma-shastras that polygamy was permissible apart from the existence of any special cause. Polygamy is, therefore, permissible in Hindu Law (f), although it recommends monogamy as the best form of conjugal life. This recommendation has been adopted by the Hindus, and monogamy is the general rule, though there are solitary exceptions and instances of polygamy also. This usage of polygamy would be justified if females outnumbered males. Hindu institutions are founded on the requirements of diversities of human nature and conditions, and should not be interfered with on grounds of mere sentimentalism.

A Hindu by his marriage under the Special Marriage Act cannot have another wife (secs. 15 and 16) besides one under the Act. So is the case of a man, having married according to Hindu rites, after embracing Christianity (m).

It is a duty imposed on the husband on his re-marrying another

(f) Dayabhaga Ch. X, §. 5. *Thapila v. Thapila* 17 Mad. 235, 239 (F. B.)

(m) *Thapila v. Thapila*, supra.

Husband's duty towards the first wife on his re-marriage.

wife in the life-time of his first wife that he should pay her as much as he spends on the second marriage, or if she has received some property as her peculium, as much as would render this equal to the amount spent over the second marriage (Yajnavalkya II, 148).

Manu (IX, 82) also says, "When the husband marries a second time owing to the ill-health of the first wife although she is attached to him and is, otherwise, of good character, he should first obtain the assent of that wife and must not slight her in any way "

या रोगिणी स्यात्तु द्विता सम्पन्ना चैवशीलतः ।

सनुज्ञाप्याधिवेत्तभ्या नावमान्या तु कर्हिचित् ॥

There is a custom of setting aside some property by the husband in favour of the first wife when he marries a second wife (among Nattu Kottai Chetties (g) of Madura district.)

Thus Hindu Law makes ample provision for the first wife as well as respects her feelings and sentiments. But inversely it also lays down that in case she is too much irritated and leaves the house in anger she should be stopped from doing that, or if the husband so likes, he may renounce her in the presence of the whole family. (Manu IX 83)

अधिभिन्ना तु या नारी निर्गच्छेदुषिता गृहत् ।

सा सद्यः सन्निरोधक्या त्याज्या वा कुलसन्निधौ ॥

The apparent anomaly between permitting polygamy and prohibiting widow re-marriage would be easily solved if the peculiar constitution of an ancient Hindu family is kept in view. Whenever a new member is introduced in a family by marriage or adoption, she becomes deeply attached to the family and severance becomes impossible so much so that even in case of the death of the husband, on account of whom the woman was introduced in the family, she remains a part and parcel thereof as before. So at the time of solemnisation of marriage the wife is pointed out the pole-star, as a symbol of constancy and has to pray 'as this star is constant, so may I be constant in my husband's family' The same considerations do not apply in the case of men. There is no doubt that some times the right of having more than one wife is abused by men, but it is due to social causes and its reaction has now led to the result that monogamy is the rule and polygamy an exception.

Polyandry. Polyandry or the marriage of a single woman with several men was prevalent only amongst the non-Aryans, but not amongst the Aryans. It is not lawful, except

in some tribes where it is recognised as valid by custom. There is the

(g) *Palamagha Chetti v. Alagan Chetti*, 44 Mad 740, 48 I. A 339, 1922 P. C. 228, 26 C. W. N. 417, 64 I. C. 439, 25 M. L. W. 521, 1922 M. W. N. 687.

solitary instance of the marriage of *Draupadi* with five Pandava brothers in the epic poem of the *Mahabharata*; dissertation on it shows that this exceptional kind of marriage was not at all approved by Hindu Law.

Betrothal is a mere promise of marriage by the father or other guardian of a girl and does not in any way create any marital relationship. It is his duty to fulfil the promise in due course; but it is permissible to annul a betrothal if a better suitor be forthcoming (Yajnavalkya I. 65)

Betrothal.

सकृत्प्रदीयते कन्याहरस्तां चौरदण्डभाक् ।
दत्तामपि हरेत् पूर्वोच्छेयांश्चेद्वरआव्रजेत् ॥

Narada (XII. 32) has declared that in case of refusal without any just cause, the promisor is liable to be punished by the king.

दत्त्वा न्यायेन यः कन्यां बराय न ददाति तां ।
अदुष्टश्चेद्वरोराज्ञा स दण्ड्यस्तत्रचौरवत् ॥

On the other hand when the suitor's consent has been obtained by fraud, or when the girl is suffering from some disease, he cannot be forced to fulfil his promise. But for any justifiable cause, he cannot refuse to marry the girl after betrothal and the king can enforce the marriage.

प्रतिगृह्य तु यः कन्यामदुष्टामुत्सृजेन्नरः ।
सविनेयस्त्वकामोऽपि कन्यां तामेव चोद्वहेत् ॥

But the enforcement of a promise of betrothal would be a dangerous experiment and the courts have, therefore, refused to give effect to it, so the only remedy is an action for damages. According to Hindu sentiments, however, of not trying to realise any money from a suitor, such cases rarely go to court.

Marriage in Hindu Law is regarded as an indissoluble union of the husband and the wife extending to the next world. It is, thus, a sacrament and not a contract, and is always accompanied by solemn religious rites. A Muslim marriage is essentially a contract, the terms and conditions relating to which may be settled between the parties or even varied subsequently. An English marriage is monogamous and its conception is that of a contract like a Muslim marriage. Both these latter systems allow divorce, the Muslim Law being more liberal so far as the freedom of the husband is concerned. English Law, like Hindu Law, recognises the doctrine of coverture.

Under Roman Law, originally the wife had very little of personal

Position of a wife : (1) under Roman Law.

or proprietary independence, but gradually her independence and proprietary position improved. Sir Henry Maine has explained its successive development, thus : "Anciently, there were three modes in which marriage might be contracted according to Roman usage, one involving a religious solemnity ; the other two, observance of certain secular formalities. By the religious marriage, or *confarreatio*, by the higher form of civil marriage, which was called *co-emptio*, and by the lower form, which was termed *usus*, the husband acquired a number of rights over the person and property of his wife which were on the whole in excess of those conferred in any system of modern jurisprudence. But in what capacity did he acquire them? Not as a husband, but as a father. By the *confarreatio*, *co-emptio* and *usus*, the woman passed in *manum viri*, that is, in law she became the daughter of her husband. She was included in his *patria potestas*. She had all the liabilities springing therefrom while it subsisted and survived them when it expired. All other property became absolutely his, and she was retained after his death in tutelage of the guardian whom he had appointed by will. These three ancient forms of marriage fell, however, gradually into disuse, so that at the most splendid period of Roman greatness, they had almost entirely given place to a fashion of wedlock which was founded on a modification of the lower form of civil marriage. Without explaining the technical mechanism of this institution now generally popular, I may describe it, as amounting in law, to a little more than temporary deposit of the woman by her family. The rights of the family remained unimpaired, and the lady continued in the tutelage of guardians whom her parents had appointed and whose privileges of control overrode in many material respects, the inferior authority of her husband. The consequence was that the situation of Roman female, whether married or unmarried, became one of great personal and proprietary independence."

In the Muslim system a girl remains under the control and care of her parents during her minority ; but on attainment of puberty, the law vests in her all the rights and privileges which belong to her as an independent individual ; she is entitled to a share of the inheritance of her parents along with her brothers, though in different proportions, also that of her husband and of other relations. Marriage does not affect her independence in any way and she does not pass out of her natural family. Her property, whether accruing by inheritance or self-acquisition, remains hers in her absolute individual right and the doctrine of coverture is not recognised in Islam. So in the Islamic

(2) Under Muslim Law.

system a woman occupies a legal position superior to that of her English or Hindu sister.

A woman suffered from proprietary incapacity under the English Common Law, due to the Canon Law which held that husband and wife constituted, so to say, one single person ; and so during coverture her legal existence as a distinct person, or her right of holding separate property as separate from her husband or any other person could not be recognised, or that she could not bring any action for redress against any body without the concurrence of her husband. These disabilities were subsequently much modified by the Courts of Equity even before the passing of the Married Womens' Property Act which improved the position of women considerably. Sir Henry Maine's observation is very relevant on the point : "I do not know how the operation and nature of the ancient *patria potestas* can be brought so vividly before the mind as by reflecting on the prerogatives attached to the husband by the pure English Common Law, and by recalling the rigorous consistency with which the view of a complete legal subjection on the part of the wife carried by it where it is untouched by Equity or Statutes, through every department of rights, duties and remedies."

While under the Muslim system, the position of a woman is one of complete independence having proprietary rights to the extent which no other system confers, the Hindu Law allowed a woman greater personal freedom and larger proprietary rights than the Roman or the English, while at the same time, care was taken to afford her such protection as her comparative weakness would naturally demand. So much so that litigation between the husband and the wife was allowed by Hindu Law, when necessary, although it was much discouraged ; while the English Common Law did not allow it until it was modified by Statute, 45 and 46 Vict. C. 75.

Litigation between Husband and wife.

SECTION 2. FILIAL RELATIONSHIP OR SONSHIP

Legitimacy of issue depends upon the legality of marriage. A son is generally assigned in law to the male who was the legal owner of the mother. Further, filial relationship was itself capable of being assigned by the person to whom the son was subject, or by the son himself if emancipated. If this view were correct the theory that the *levirate* is invariably a survival of polyandry will fall to the ground. It would appear that sonship and marriage stand in no relation to each other.

Principle of sonship.

A man's son need not have been begotten by his father, nor need he have been born from his father's wife. The modern conception of marriage and sonship is the outcome of ages of culture, and is based on two common features of all primitive societies : *firstly*, the existence of a patriarchy, and *secondly*, ownership by the patriarch of his wives and children, and his right of disposing of them just like chattels.

As persons of the male sex were of utmost importance in primitive society, the necessity for begetting or buying sons followed as a matter of course. The civil law of those days conferred special privileges on the father of several sons and it popularized the institution of adoption to which a religious tinge was given later on. The son in archaic society took the same place as a recruit in a modern regiment. The patriarchal family was a self-centred State, of which the father was the king. The son and other dependant members had no property of their own. When the *patria potestas* was removed, the sons commenced to enjoy a certain measure of independence. This is the genesis of the law of sonship and adoption.

As many as twelve kinds of sons are generally named by our religious books, the Dharma-Shastras, while some
Kinds of sons. recognise as many as eighteen

I. PRIMARY SONS: मुख्यः

(1) *Aurasa* औरस (legitimate son)—A son begotten by the father upon his lawfully wedded wife.

(2) *Putrika putra* पुत्रिकापुत्र—The son of an appointed daughter.

(3) *Kshetraraja* क्षेत्रज—The son begotten by a stranger upon a man's wife through appointment.

(4) *Gudhaja* गुहज—The son secretly conceived in the husband's house from a man other than the husband.

(5) *Kanina* कानीन—The son of a damsel.

(6) *Pannarbhava* पौनर्मव—The son of a twice-married woman.

II. SECONDARY SONS:

(7) *Dattaka* दत्तक—The son given in adoption by his father or mother.

(8) *Kritaka* कृतक—The son bought from his parents

(9) *Kutrima* कुत्रिम—The son, who, being an orphan, is taken in adoption with his own consent.

(10) *Swayamdattaka* स्वयंदत्तक—The son, abandoned by his parents, presenting himself to another saying, 'Let me become thy son',

(11) *Sahodha* सहोद—The son taken with the bride being in his mother's womb at the time of marriage.

(12) *Apaviddha* अपविद्ध—The son cast off by his natural parents and taken by another.

The following sons are also mentioned by some Sanskrit writers :

(13) *Nishada* निशाद—The son of a Sudra woman.

(14) *Parasava* परासव—The son of a concubine.

(15) *Saudra* शौद्र—The son of twice-born by a Sudra wife.

(16) *Vijaya* विजय—The son begotten on another's wife.

(17) *Yatra kutra cha utpadita* यत्र कुत्र च उत्पादित—The son begotten on any woman

(18) *Dvayamushyayana* द्वयमुषायन—The son of two fathers.

Out of these, the first alone, *viz.*, the Aurasa, was recognised as a legitimate son in the proper sense of the term, and the second, *viz.*, Putrika putra having no stain in blood was recognised as of equal status, but others were sons only in a secondary sense (Manu IX. 180). A different order has been assigned to these twelve kinds of sons by different sages. The son of an appointed daughter is not specified in Manu's list, as he has been already described and stated to be equal to an actual son (Manu IX, 134-36). The low position, however, assigned to him by Gautama has been explained by Mitakshara to be due to the fact that a daughter's son belongs to a different family [Mitakshara I, 11, 35]. Vijnaneshwara quotes both Manu and Yajnavalkya, but follows the former as to the order of the sons (Mit. I, 11, 30, 31). Jimutavahana follows Devala (Dayabhaga X, 7; Puddo Kumaree v. Juggut Kishore 5 Cal. 630).

The relative positions of these sons (1) as members of joint family and (2) as regards competency to offer oblations are given below. The ancient legislators divided the different classes of sons into two groups. The first were called "*heirs and kinsmen*," and the members of the second group were signified with the name of '*kinsmen*' but were not heirs. Manu has given the relative order of sons thus: the first class who are heirs and kinsmen consists of Aurasa, Kshetrāja, Duttaka, Kṣitrima, Gudhaja, Apaviddha and the second class of Kanina, Sahodha, Kritaka, Paunarblava, Svayamdattaka, Saudra :

पुत्रान् द्वादश यानाह नृणां स्वायंभुवोमनुः ।

तेषां षड् बन्धु दायादाः षड् दायाद बान्धवाः ॥

औरसः क्षेत्रजश्चैव दत्तः कृत्रिम एव च ।

गूढोत्पन्नो ऽपविद्धश्च दायादा बान्धवाश्च षड् ॥

कानीनश्च सहोदश्च क्रोतः पौनर्भवस्तथा ।

स्वयंदत्तश्च शौद्रश्च षड् दायाद बान्धवाः ॥ [Manu IX 158-60]

Yajnavalkya (II. 128-132) while describing twelve kinds of sons has given their relative order thus (as is given above at p. 44) :

औरसो धर्मपत्नीजस्तत्समः पुत्रिका सुतः ।
 क्षेत्रजः क्षेत्रजातस्तु सगोत्रेणेतरेण वा ॥
 गृहे प्रच्छन्न उत्पन्नो गूढजस्तु सुतः स्मृतः ।
 कानीनः कन्यका जातो मातामह सुतो मतः ॥
 अक्षतायां क्षतायां वा जातः पौनर्भवः सुतः ।
 दद्यान्माता पिता वा यं स पुत्रो दत्तको भवेत् ॥
 क्रीतश्च ताभ्यां विक्रीतः कृत्रिमः स्यात्स्वयं कृतः ।
 दत्तात्मा तुस्वयं दत्तो गर्भे विन्नः सहोदजः ॥
 उत्सृष्टो गृह्यते यस्तु सोऽपविद्धो भवेत्सुतः ।
 पिण्डद्वौऽशहरश्चैषां पूर्वाभावे परः परः ॥

Both these jurists describe six classes of sons. The last six were considered inferior in social status to the first six. There was the lower class of sons who formed a part of joint family. Now let us examine the relative positions of these.

It should be noticed that Gautama and Manu adopted a principle of classification different from that of Vashistha and Yajnavalkya. Gautama, Baudhayana and Manu placed the son given (Dattaka), the son made (Kritrima), the son of concealed birth गूढज and the son cast off अपविद्ध in the first group. The principle of legitimacy and the holy tie of marriage must have outweighed every other consideration with them and though a stigma of illegitimacy attaches to Gudhaja, yet he is classed as a member of the former group. The reason is quite clear for a son of concealed birth. When he is acknowledged as a son—as a son born of wedlock, the stigma of illegitimacy is removed and he takes his legitimate place as a kinsman and heir.

While this was the reasoning of Manu and Gautama, their followers argued that Kshetraja, Kanina, Paunarblava and Gudhaja belong by the female side at least, to the family of the person in question, and are possibly the sons of some members of the family. Their affinity, therefore, was stronger than that of strangers, such as, Dattaka, Kritrima, Krita, Apavidlia and Svayamdattaka.

It was only on failure of the sons of the body born in lawful wedlock that the other classes of sons inherited paternal estate from time immemorial. The son born of lawful wedlock held the first rank. Second to him was associated Putrika putra. Vedas also give to the Putrika putra a position second only to that of the son born in lawful wedlock. In ancient times also Putrika putra and Kshetraja long contended with varying success for the second place in the first group,

and their position remained undecided till after the time of Apastamba. A death-blow was given by Baudhayana to the claims of the illegitimate sons of the wife ; and the appointed daughter and her son and the adopted son triumphed. Manu even assigned the second place to Putrika putra,

यथैवात्मा तथा पुत्रः पुत्रेण दुहिता समा ।
 तस्यामात्मनि तिष्ठन्त्यां कथमन्यो धनं हरेत् ॥ [IX. 130]
 पौत्र दौहित्रयोर्लोके न विशेषोऽस्ति धर्मतः ।
 तयो हि माता पितरौ सम्भूतौ तस्य देवतः ॥ [IX. 133]
 अकृता वा कृता वापि यं बिन्देत् सद्गृहास्तुतम् ।
 पौत्रो मातामहस्तेन दद्यात् पिण्डं हरेत् धनम् ॥ [IX. 136]

In the palmy days of India, the principal aim was to increase the strength of the family and to make it unassailable against foreign enemies. Numerical strength was a necessary condition by which peace could be secured and all efforts were directed towards making the family numerically strong ; when natural ties were wanting, artificial ties were created and strangers were freely adopted in the family group. In a joint family all the members formed inseparable parts of a compact body, and their separable existence was not recognised by the society. They were maintained by the family, and were all engaged in its service. In joint family the Aurasa putra had preferentially the right to perform annual and other Sradhs and also the funeral ceremonies. Thus, the competency to offer oblations in joint family belongs to the Aurasa putra and if there are several of them, to the eldest. On the failure of Aurasa putra, sons of other description were competent to perform Sradhs and offer oblations. The following text of Vrihat Parasar will make the point quite clear :

औरसाद्यः स्मृताः पुत्राः मुनिभिः ब्राह्मणैश्च तु ।
 श्राद्धप्रदाः क्रमेणस्युः पूर्वाभावे परः परः ॥

The distinction between Kritrima and Svayamdattaka is clearly stated in the Mitakshara as follows :—

कृत्रिमस्तु पुत्रः स्वयं पुत्रार्थिना धनक्षेत्रप्रदर्शनादि प्रलोभेनैव ।
 पुत्रीकृतः मातापितृविहीनः तत्सङ्गावे तत्परतंत्रत्वात् ॥
 दत्तात्मा तु स्वयंदत्तः दत्तात्मा तु पुत्रो योमातृपितृविहीनः—
 स्ताभ्यां त्यक्तो वा तवाहं पुत्रो भवामीति स्वयंदत्तत्वमुपगतः ॥

Kamalakara, while enumerating the relations competent to perform the Sradha ceremony has observed that though the word ' son ' signifies any of the twelve sons, yet in the Kali age it is to be confined to the Aurasa and the Dattaka only in consequence of the other kinds being prohibited by the Aditya-Purana cited in Hemadri's work. But he also maintains that the eleven kinds of subsidiary sons are competent

to perform the **exequial ceremonies** only in default of a real legitimate son, grandson and great-grandson. Referring to the Prithvi-Chandrodaya he says that the unapproved sons, such as the unmarried daughter's son, the secretly-born son of the wife, and the son of the twice-married woman, are competent to perform the Sradha ceremony. As regards impurity caused on the occasions of death or birth, he lays down that in the case of the son given, the son purchased, the son made and other sons, the period of pollution extends only to three nights, not to ten days in Kali age, relying upon the authority of Vrihaspati in support of his view which condemns only the Kshetrajā and other sons by operation of law. Therefore, according to this author, six kinds of sons, *vis*, Aurasa, Putrika putra, Dattaka, the son bought, the self-given son and the son made are recognised in the present age. A later composition, *i.e.*, Dattaka-Mimamsa has laid down that eleven substitutes were ordained in the absence of *Aurasa* son, but this Kali age recognises only the *Aurasa* and the *Dattaka* sons; and *Dattaka* includes *Kritima* as well. Its author, Nanda Pandit, did not refer to Aditya-Purana but to Saunaka, and would recognise *three* kinds of sons in the opening section, but later on, he deals with *Kshetrajā*. It appears, that the author was unconsciously betrayed into the inconsistency of dealing with an usage which existed in society, but was attempted to be ignored. The inconsistency of the author as mentioned in the Vivada-Tandava, *vis*, omission to take into account the distribution of property amongst sons belonging to different families on the ground of prohibition of marriage of a twice-born with a damsel of a different family, and his subsequent discussion of the rights of the son of a twice-born by a Sudra wife, prove that the matter was then in an unsettled state.

As regards sonship the *Mitakshara* deals with Dvyamushayayana, or son of two fathers (I. 10) and then explains the text of Yajnavalkya, describing the twelve kinds of sons, discussing their rank and relative rights, their status in the adoptive family and their rights of inheritance from their legal father and his relations (I. 11). The duty of appointment to raise an issue has been said to be obsolete, but nothing has been said about the other kinds of sons. The Dayabhaga discusses the relative rights of a legitimate son and an appointed daughter's son and then deals with the rights of the other kinds of sons. The text of Devala has been cited to show that a subsidiary son gets a third share in the presence of a legitimate son; two conflicting passages from Manu are cited, one of which gives to the Kshetrajā son a sixth or a fifth share, and the other declares the real legitimate son to be entitled to the entire patrimony, to the exclusion of the secondary sons who are held entitled to

Growth of sonship.

maintenance only. The Dayabhaga attempts to reconcile these rules by holding them to relate respectively to the superiority or inferiority of the caste of the subsidiary son, as compared to that of the father and the *Aurasa* son. These details go to show that the twelve kinds of sons were recognized in the days of Jimutavahana. The *Smṛititattva* of Raghunandana Bhaṭṭaṭiarya who flourished in the middle of the sixteenth century says that inter-marriages between four different castes should be avoided in this Kali age, and citing *Vṛihannaradiya Purana* and *Aditya-Purana*, observes that the practice of having sons other than the *Aurasa* or real legitimate son and the *Dattaka* son must be shunned in Kali age. *Vīramitrodaya*, who flourished at the close of the sixteenth or the beginning of the seventeenth century, supports the same view as advanced by the *Mitākshara*. On the authority of *Aditya-Purana*, he holds that this practice must be shunned in the Kali age, but it is very surprising to note that he describes the twelve varieties of sons without saying a word that any of them has become obsolete. Kamalakara Bhaṭṭa in his *Vivada-Tandava* and *Nirnaya-Sindhu*, which were composed in the beginning of the seventeenth century on the authority of *Aditya-Purana* cited by Hemadri, declared that the *Aurasa* or real legitimate son and the *Dattaka* should alone be recognised in the Kali age. He also holds that as the appointed daughter's son is said to be equal to the *Aurasa* son, and as the purchased son, the self-given son and the son-made are similar to the *Dattaka* son, these are also recognised in the institutes of *Parasara* who is considered to be the highest authority in the Kali age. His incidental references to some kinds of sons in these texts show that he recognised them: "If seeds be carried either by a stream or by wind unto the soil of a person's field, and a crop is yielded by the field so sown, the crop will belong to the owner of the soil, not to the person who owned the seeds The son is either an *Aurasa* or son of the body, or a *Kshetrāja* or the appointed wife's son, or a *Dattaka* or one obtained by gift, or a *Kṛitrīma* or son-made. If either the father or the mother gives, the same is called a given son." *Paunarbhava* seems to have been recognised by this text—"When her husband is missing, or is dead, or has renounced the world, or is impotent or has been degraded by sin,—or any of the said five calamities befall a woman, law has ordained another husband for her." Thus *Parasara* recognised five kinds of sons. *Dattaka*, *Chandrika* and *Mayukha* recognised only *Aurasa* and *Dattaka* sons.

The result of this limitation as to the recognition of *Aurasa* and *Dattaka* sons alone is, that the original conception of sonship has undergone a very great change, and a son now means either a truly legitimate son or

Ultimate conception of sonship.

an adopted son who is assimilated to the adopter by a legal fiction, and by reason of the mysterious force of ceremonies is treated to have been re-born in the family of the adopter. This has given rise to a number of rules limiting the choice of an adopted son so as to prevent that fiction from appearing unnatural. This altered conception of sonship would not allow the recognition of the doctrine of Roman Law—*legitimatio per subsequens matrimonium*.

In the *Puranic* age this list was further curtailed, and it was declared that the wise men had, in the beginning of the Kali Yuga, solemnly prohibited certain practices including the recognition of various classes of sons besides *Aurasa* and *Dattaka* for the protection of the people, and that such a resolution arrived at by the virtuous carried as much authority as a text of the Veda itself (x).

दत्तोरसेतरेषां तु पुत्रत्वेन परिग्रहः ॥

Aurasa and Dattaka alone recognised. Kritrima in Mithila only. *Aurasa* and *Dattaka* sons alone are, therefore, recognised these days, except in Mithila where *Kritrima* form of adoption is also prevalent as it was held by Dattaka Mimansa that *Dattaka* included *Kritrima*:

दत्तपदं कृत्रिमस्याद्युपलक्षणं ।

Manu and Yajnavalkya do not include *Putrika putra* in their enumeration of secondary sons, but recognise him as an *Aurasa*. Their Lordships of the Privy Council also recognised the validity of an appointed daughter's son, if proved to be regularly made (a). But the Madras High Court has held against the validity of the affiliation of a *Putrika-putra* upon a different ground, namely that the usage has become obsolete (b). *Sahodhaja* or the son of a pregnant bride, has been recognised by the Privy Council (c). A *Paunarbhava* son has been raised to the status of an *Aurasa* by the Hindu Widow Remarriage Act XV of 1856 and *Kritaka* as invalid (d). It was held in *Nilmadhub Dass v. Bishumber Dass* (13 M. 1. A. 85) by their Lordships of the Privy Council, that *Palakputra* received with the consent of the real father, retained his natural relationship and could not be debarred from the right of inheritance in his natural family. It was doubtful whether the son was *Palakputra* or *Dattaka*.

(a) *Eshan Kishore Acharyea Chowdhry v Hursh Chandra Chowdhry* 21 W. R. 381.

(a) *Thakoor Jeab Nath Singh v. The Court of Wards* 2 I. A. 163.

(b) *Sri Raja Venkaja Narasimha Appa Row Bahadur v.*

Sri Raja Suraneni Vankala Purushothama Jagannatha Gopala Row Bahadur 31 Mad. 310.

(c) *Pedda Amani v. Zemendar of Marungopur* 1 I. A. 287.

(d) Dr. Sen's Hindu Jurisprudence, p. 236.

Illegitimacy under Hindu Law is no absolute disqualification for marriage, and when one or both contracting parties to a marriage are illegitimate, the marriage must be regarded as valid provided they are recognised by their caste people as belonging to the same caste (a), even where one of them is a Hindu and the other a non-Hindu, provided they are brought up and received as Hindus (b). The same principle applies to children of mixed parentage (c). They possess the right of maintenance against their father except that in the Bengal school it ceases upon their attaining majority. Amongst the twice-born they have no right of inheritance, but amongst the Sudras they have rights equal to those of a legitimate son provided they were born of a permanent concubine. It follows, therefore, that Hindu Law does not, like the English Law, consider an illegitimate person *quasi nullius* or as if he was son of no body.

"The Aurasa, (2) Putrika putra, (3) Kshetrāja, (4) Gudhaja, (5) Kanina, (6) Pannarbhava, (7) Dattaka, (8) Kritaka, (9) Kritima, (10) Svayamdatta, (11) Sahodhaja and (12) Apavidhha, (succeed in order).....In default of the first among these the next in order is the giver of the pinda and the taker of the share." (Yaj. II, 128—32) The Hindu Widow Re-marriage Act XV of 1856 implies the recognition of *Pannarbhava* son. The inter-marriages between different castes of the Hindus are valid. This fact as well as the Caste Disabilities Removal Act, XXI of 1850, has given safer status and position specially to the eleven kinds of sons.

Effect of Acts XV of 1856, XXI of 1850 and inter-marriages on the position of these twelve sons.

SECTION 3. PARENTAL AND QUASI-PARENTAL RELATIONSHIP

The recognition of sonship in all these cases did not imply absolute equality of status. Manu (IX, 161) has said, "A person who wishes to cross the darkness of the future world through sons of an inferior class obtains the same sort of result as a person who wishes to cross a stream by an ill constructed vessel."

यादृशं फलमाप्नोति कुस्रवैः संतरङ्गलम् ।

तादृशं फलमाप्नोति कुपुत्रैः सन्तरन्तम् ॥

It cannot be denied that in the absence of a son of the primary kind, these inferior sons stood as a substitute for him. The recognition of

(a) *Ram Kumari*, In re. 18 Cal. 264.

(b) *Kyna Boyce v. Quasam* 8 M. I. A. 400, 410.

Abraham v. Abraham 9 M. I. A. 195, 239, 240, 241
(c) 8 M. I. A. 400; *Lingappa v. Esudasen* 27 Mad. 13.

Cause for such a recognition

Dattaka, *Kritrima* or *Kritaka* or the case of appointment to raise an issue upon another man's wife may be said to be due to the intense desire of an ancient house-holder to have a son, but it cannot be so said with regard to other kinds of sons.

Mayne's view criticised.

Mayne's view (at p. 83, 8th Ed.) is that the true solution of the problem as to how they came to be regarded as sons, is to be found in the indispensableness of a son to an ancient Aryan house-holder which led to every contrivance being used to procure one, and the relations between the sexes in early times were such that neither delicacy nor sentiment stood in the way of begetting a son. The customs of adoption and appointment may be said to have their origin in the desire to have a male child to perpetuate the lineage and to offer funeral oblations, but in spite of that the practice of appointment was condemned in very strong terms, as is evident from the text of Manu, "No widow should be authorised by regenerate men to beget children by other persons, for those that authorise her to conceive by other men violate the eternal law. Such appointment is nowhere mentioned in the Vedic texts on marriage, nor is the re-marriage of widows mentioned in the law relating to marriage; this practice, fit only for brutes, and condemned by learned regenerate men, was introduced among men while Vena held the sovereign sway; he, ruling the whole world and eminent among the royal saints, produced confusion of tribes while his intellect was perverted by passion; since then, the virtuous censure him, who, through clouded intellect, authorises a widow to have intercourse with a man for the sake of progeny." In other texts (V. 158-60) Manu says, "Longing for the unparalleled virtue of those who are constant to one husband, she should continue till death, forgiving all injuries, observing strictly rules of continence, and foregoing all sexual pleasure; many thousand Brahmins have ascended the celestial regions without leaving any issue; like those lifelong students, a chaste woman leading a life of austerities after the death of her husband, goes to heaven though destitute of sons; a woman who being covetous for offspring proves faithless to her husband, brings disgrace on herself in this world, and becomes excluded from the regions of her lord in the next." In such circumstances, when fidelity to the husband is so seriously enjoined and its violation so very severely condemned, the recognition of other sorts of sons cannot be ascribed to any base motives. Mayne's problem is susceptible of another explanation which is clear from the next para (in his book) which deals with the theory of paternity among the Hindus. The ancient conception of family relationship among

**Theory of
paternity in
ancient Hindu
Law.**

the Aryans was that a child must be under the *patria potestas* of some individual, whether the child be legitimate or otherwise. The question, therefore, arose as to who could be the father of a child in other cases, and the answer was the enumeration of subsidiary sons as mentioned above. The different varieties of sons as given above show that the practice developed in two ways :

(1) through dominion over the mother of the child; and,

(2) through transfer of *patria potestas* from the natural parents either by gift or sale, or by the consent of the child when freed from the *patria potestas* of the parents either by reason of their being dead, or by reason of their having cast him off (x).

According to the old conception of paternity the husband of a woman becomes vested with *patria potestas* over the son of that woman although he may not be his real procreator, as Manu says on the analogy of ownership over the produce of a field, when the field belonged to one and the seed was sown by another, "unless there is a special agreement, between the owners of the land and of the seed, the crop belongs clearly to the land-owner, for the receptacle is more important than the seed," and he concludes by saying that a similar rule applies in the case of a child (y). This is in conformity with the general conception of law that what is planted in the soil goes with the soil.

The various forms of adoption show that it was essential that in such cases the *patria potestas* of the natural father should somehow or other cease. This condition of transfer of *patria potestas* had to be fulfilled whether the adoption was due to a desire on the part of the adopter,—as in *Dattaka*, *Kritima* or *Kritika* forms of adoption,—or on the part of the child to obtain protection from danger or destitution due to the death or abandonment by the natural father,—as in *Swayamdatta* and *Apaviddha* forms of adoption,—or in the case of a son born of an unmarried woman. It is quite evident that this recognition of several kinds of sons meant no more than that sonship implied subjection to the *patria potestas* of an individual although paternity, in true sense, could not be ascribed to him.

There was a gradual curtailment of this wider conception of paternity till Parasara, who is supposed to lay down the law for the *Kali Yuga*, recognised only four kinds of sons, viz., *Aurasa*, the true legitimate

(x) Dr. Sen's Hindu Jurisprudence, p. 234.

(y) Manu IX-42, 48-53, 167.

son, *Kshetrāja*, the son of a wife by appointment, *Dattaka*, the son given and *Kṛitrīma*, the son made

औरसः क्षेत्रजश्चैव दत्तः कृत्रिमकः सुतः ।

The despotic and absolute power which the head of the house-hold in ancient times had not only over his slave but also over his wife, children, and grand-children, if born during his life-time came, according to Sir H Maine, to crystallise itself under the name of *patria potestas*.

Extent of patria potestas under the Hindu Law as compared with other systems :

Among the Hindus, the germ of a rudimentary form of *patria potestas* is not indiscernible. For it is nothing but the manifestation of *patria potestas* when it is said that neither the wife nor the son nor the slave can acquire wealth, and that all their earnings belong to him to whom they themselves belong (Manu, VIII, 416) :

भार्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः ।

यस्य समधिगच्छन्ति यस्य ते तस्य तदनम् ॥

By this rule the sage emphatically declared that all earnings belonged to him to whom the wife, the son and the slave belonged, that is to say, the husband, the father, the master of the house-hold, was the sole chief invested with despotic power over every thing, animate or inanimate, human or otherwise that comprised within the area of that house-hold.

Again the fact that a son and a wife were classed together with slaves and that the mode of administering chastisement upon each was identical, was but an indication of *patria potestas*. It proved the existence of a general feeling that the position of only one individual in the family was marked out as superior, namely that of its head, the rest being all on an equal footing and inferior to him in status.

Again by referring to Maine's account of the liabilities and rights falling under the institution of the *patria potestas* among the Romans, we find (1) that the *pater familias* was accountable for the torts of his sons under his control, (2) that the parent and child could not free each other, and (3) that the persons of the sons were at the absolute disposal of their father.

The last two elements are directly analogous to the doctrine of Hindu law. Thus the Mitakshara in its comments (Shloke 32 of Ch. 2) cites a text without naming the author, and it runs as follows: "There can be no law suit between a father and a son, between a preceptor and

his pupil, between a husband and his wife, and between a master and his servant, although they may have mutually fallen out.

गुरोः शिष्ये पितुः पुत्रे वम्पत्योः स्वामिभृत्ययोः ।

विरोधे तु मिथस्तेषां व्यवहारो न सिध्यति ॥

Whatever justification Vijnaneshwar may have had, it seems we would not be guilty of drawing a far-fetched inference were we to suppose that the text presents unmistakable mark of the bygone state of society under which a litigation between a father and his son or a husband and his wife was out of question.

The element in the aggregate powers being vested in the ancient chief of the household which relates to the absolute control over the persons of the sons, is equally well evidenced by the indubitable primitive law laid down by courts promulgated by sages. Thus, Vijnaneshwar says, "as the son owes his origin to the seed and blood, his father and his mother constitute the cause of his existence, the father and the mother are free to sell him, or forsake him or give him away. But one should not give away the only son, for he is to continue the lineage of his forefathers; nor a woman give or accept the son except with the assent of her lord."

शोणितशुक्रसम्भवः पुरुषःमातापितृनिमित्तकः ।

तस्य प्रदानविक्रयत्यागेषु मातापितरौ प्रभवतः ॥

One would not but be disposed to see in the text of Vashistha, a mark not only of *patriarchal stage* but of a state of society, yet earlier and still more uncivilised. That the custom of giving away a son is part of very primitive and rude customs of uncivilised nations, is further confirmed by another indication, faint though it be, yet not to be ignored, which can be seen in the text of Manu which runs thus :

माता पिता वा दद्यातां यमद्भिः पुत्रमापदि ।

सदृशं प्रीति संयुक्तं स ह्येवो दत्तमः सुतः ॥

However much the commentators may betake themselves to strange shifts to give an account of the word 'Apadi' we cannot but admit that along with other facts in the history of Hindu Law, it testifies to the prevalence in early Hindu society, of the structure of a special organisation which is characterised by extensive powers vested in the father as the chief of the house-hold, powers which extended to the gift or sale or even abandonment of a son.

The other feature of the Roman *patria potestas*, mentioned above, *viz.*, the responsibility of the *pater familias* (father) for the wrongful

acts of the son, cannot be so directly recognised in the remnants of our ancient law. It cannot be found to have been present in any other sense than that of joint responsibility attaching to the members of a house-hold. Thus, Manu says (Ch. VIII, 169):

त्रयः परार्थे क्लिश्यन्ति साक्षिणः प्रतिभूः कुलम्

The text has left in obscurity the question, as to how the family would suffer on account of others. Manu when declaring that families (Kula) suffer on account of others, likens the liability of family with that of the sureties. Manu says that as surety suffers for another, so family suffers for the conduct of its members. We find that even a son of a surety suffers loss of money on account of the wrongful conduct of his father's principal. We may fairly conclude from the analogy between a surety and a family that in ancient times a family suffered for the wrongful conduct of one of its members, and had to compensate the injured party. This vicarious liability of a surety would perfectly resemble the liability of the family if we take its meaning to be in accordance with the above named custom of other societies of the patriarchal type (x). Dr. Sen, however, thinks that no trace of this primitive conception of delinquency and its retribution is to be found in Hindu Law. The only additional point which is mentioned by him, is the extent of *patria potestas* in respect of a son's marriage.

We find that under Roman Law the marriage of a son under his power was completely under the control of the father. Thus, the consent of *pater familias* was a condition precedent to the validity of such a marriage, and the absence of consent rendered the marriage absolutely void so that not even subsequent consent would ratify it. "Under Hindu Law, there is no text requiring the consent of the father for the validity of the marriage of the son. On the other hand, inasmuch as it is the bride-groom who accepts the gift of the bride, it is his consent that is essential for the completion of the gift and the creation of marital relationship. Apastamba says that bridegroom's consent is not a negligible factor."

As regards the Roman Law on the subject, Mr. Sanders says,

**Extent of patria potestas:
I. In Roman Law.**

"The *patria potestas* differed originally little, if at all, from the *dominica potestas*. If the sense of the ownership was not so complete in the former, it was probably limited more by natural feeling than by law. The father could sell, expose, or put to death his children. Time, however,

(x) Bhattacharya. Joint Hindu Family.

ameliorated the position of the child, and all that was left was a power to inflict moderate chastisement, and to sell at the time of birth in cases of extreme necessity. Constantine condemned the father who killed his child to the punishment of a parricide. The sale of a child was in general fictions the mode by which the child was released from the father's power." (a). According to Manu (VIII, 299, 300) a

II. In Hindu Law: (1) Moderate chastisement.

father had no right to do anything more than inflict moderate chastisement upon his son only as a punishment for an offence, using a string or a light rattan, and taking care to strike on the back and never on the head. If the father beat in contravention of these provisions he was to be punished like a thief.

भार्यापुत्रश्च दासश्च प्रेक्ष्यो भ्राता च सोदरः ।

भ्रातापराधास्ताभ्याः स्यू रज्ज्वा वेणुदत्तेन वा ॥

पृष्ठतस्तु शरीरस्य नोत्तमाङ्गे कथञ्चन ।

अतोऽन्यथा तु प्रहरः प्रातः स्याच्चौरकित्तिषम् ॥

Gautama has also declared that the chastisement should only be corporal in the manner as mentioned above and it should be taken recourse to in extreme cases, and even then light string should be used, any violation whereof is punishable by the king.

शिष्यशिष्टरक्षणेनाशकौ रज्जुवेणुविदलाभ्यामतनुभ्यामन्योन्यं धनुं राक्ष्या शास्यः ।

The father, therefore, did not ever possess anything like the power of life and death in Hindu Law, but simply the power to exercise moderate chastisement in extreme cases, and that also with certain restrictions. So the conception of *patria potestas* in Hindu Law differed materially from that of Roman Law where Justinian says, "The power which we have over our children is peculiar to the citizens of Rome ; for no other people have a power over their children such as we have over ours." (b)

As regards the father's power of gift and sale there is a great conflict amongst the authorities. Vashistha (Ch. XV) (2) Power of gift and sale. says that in as much as the son springs from the corporeal particles of the parents, they are the cause of his being, and so they have the power to give, sell, or cast him away.

शुक्रशोणितं सम्भवः पुत्रः मातापितृनिमित्तकः ।

तस्य च प्रदानविक्रयत्यागेषु मातापितरौ प्रभवतः ॥

(a) Institutes, Lib. I, Tit 1K.

(b) Institute Lib I, Tit 1X a.

Yajnavalkya (II. 175) includes a son among objects unfit to be given.

स्वंकुटुम्बाविरोधेन देयं दारसुताद्वये ।

Narada (IV. 4, 5) adds that the son should not be given even in extreme distress or similar circumstances :

निक्षेपं पुत्रदारांश्च सर्वस्वं चान्वये सति ।

आपत्स्वपि च कष्टासु वर्तमानेन देहिना

अदेयान्याहुराचार्या यच्चान्यस्मै प्रतिभृतं ॥

Katyayana (cited in *Smṛiti Chandrika*) takes an intermediate position and says that no gift or sale should be made of sons against their wishes, but at a time of distress this may be done.

विक्रयञ्चैवदानं च न नेयाः स्युस्तु निच्छ्रवाः ।

दाराः पुत्राश्च सर्वस्वमात्मन्येव च योजयेत् ॥

आपत्काले प्रकर्त्तव्यं दानं विक्रय एव च ।

अन्यथा न प्रवर्तेत इति शास्त्रेषु धारणा ॥

Commenting on the text of Yajnavalkya, as mentioned above, Vijñāneshwara remarks that this does not indicate absence of ownership, since ownership does exist over a son, a wife, the entire property, or what has been promised to another, although these have been declared as unfit to be given.

मिताक्षरा दत्ताप्रदानिक प्रकरणम् ।

Nilkantha says that the father cannot claim ownership over the son in the same way as he claims ownership over the offspring of his cattle, since his wife is not his property in the same way as the cattle is. From the sixth chapter of the *Purva Mimamsa* it appears that although in a *Visvajit* sacrifice, the sacrificer should give away his whole property, yet the daughter, the son and the like should not be given. This indicates that the father does not have the same ownership over his son, as he has over chattels and, therefore, it has been concluded by Misra in *Tantṛavarttika* that the gift of a son in adoption is a gift only in a secondary sense. (a) *Jimutavahana* also seems to hold this opinion, as he says, "Neither is it true that the son is the property of his father, for the contrary has been shown under the head of gift of a whole estate." The term 'acquisition' would, therefore, be metaphorical in regard to son (*Dayabhaga* II, 67) Commenting on

this text, Raghunandana says, that the father has no property in the son, and the gift in adoption is permissible which is the mere semblance of it and shows that gift in no other form could be made, while Sri Krishna Tarkalankara holds contrary opinion and says that the father has property in the son, but his power of making a gift or a sale is limited, as laid down by Katyayana. The Viramitrodaya takes quite a different view and says that the texts prohibiting the gift of a son refer to the gift of an only son, but when there are more sons than one the matter would be governed by the text of Katyayana.

वीरमित्रोदयः दत्ताप्रदानिक प्रकरणम् ।

Hence the conflict amongst the text-writers and the commentators may be summarised thus : originally the gift or the sale of a son had, in all probability been allowed as an exercise of paternal authority, but gradually it fell into disuse, and all that now remains of it, is the right to give a son in adoption.

Under the Roman Law, the consent of *pater familias* was a condition precedent to the validity of a marriage, (3) **As to marriages.** and its absence rendered the marriage void ; even subsequent consent could not validate it (Institutes, Lib. V, Tit. X). No such condition, seems to have existed in Hindu Law. Apastamba expressed that the free consent of the bridegroom was not a negligible factor and that marriage became propitious when both the mind and the eyes of the bridegroom became attached to the bride.

यस्यां मनश्चक्षुषोर्निबन्धस्तस्यामुद्भिः ।

There are also other considerations in the selection of a bride which cannot be properly weighed by a youngman ; hence the father generally selects a bride. It is a matter of regret that Shastric injunctions regarding the selection of a bride are often transgressed and even ignored. Whatever the moral considerations for the regulation of such selections by the father might have been, the power under the Roman Law was more extensive in this respect than under the Hindu Law.

Under the Roman Law, the *filius familias* could not hold any property as his own, and the father was entitled (4) **Right of holding separate property.** to the whole of the son's acquisition. Some exceptions were, however, gradually introduced later : the first was *castrense peculium*, i. e., property as a reward for military service and an incentive for martial enterprise ; the second, was *quasi-castrense peculium*, i. e., acquisitions made by

certain civil functionaries by virtue of their office, and lastly, *peculium advenititium*, i. e., property acquired by inheritance from mother. Justinian included all acquisitions from other sources under this term, and declared that unless the acquisitions of the son were derived from the father's own property, 'the father shall have the usufruct but the son shall retain the ownership, so that a third person may not reap the profit of that which the son has gained by his labour or good fortune' (a). Even at this later stage, the property acquired with the help of the father's fortune belonged absolutely to the father, and with the exception of *castrense peculium* and *quasi castrense peculium*, the usufruct of other properties belonged to the father though the ownership remained vested in the son. In this respect, Hindu Law is much more favourable as regards the rights and privileges of the son, than the ancient Roman Law.

The only text which appears to deny to a son the right to hold any property during the lifetime of his father is the text of Manu (cited by Jimutavahana): "Three persons, *vis.*, a wife, a son, and a slave are declared to have no wealth of their own; the wealth which they earn is of the man to whom they belong."

भार्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः ।

यत्ते समधिगच्छन्ति यस्य ते तस्य तद्धनं ।

Commentators have unanimously explained this text as implying not want of ownership with respect to the property acquired, but merely want of free control over it by reason of the dependent position of the acquirer, in order to bring it in consonance with other texts recognising their separate ownership (b). Thus, the power of a son to acquire property for himself was very early recognised, although the father under certain circumstances could claim a share in the property so acquired. **Jimutavahana** was of opinion that the father was entitled to a share in every case in whatsoever manner the property might have been acquired. He added, "The father has a moiety of the goods acquired by the son at the charge of his estate; the son who made the acquisition has two shares; and the rest take a piece. But, if the father's estate has not been used, he has two shares; the acquirer as many; and the rest are excluded from participation." (c) **Viramitrodaya** explains the above view of Jimutavahana, *vis.*, that of father's taking a share in property acquired by his son without the aid of paternal wealth or estate, in a different way so as to make it applicable only to cases where the paternal estate is used in the acquisition of the property by the son (d), so that in this respect the Dayabhaga seems to extend

(a) Institutes Lib. II, Tit. IX.

(b) See Dayabhaga I, 26; Jimutavahana Mayukha III, 49.

(c) Dayabhaga II, 71.

(d) Viramitrodaya Ch. II, Part I, Sec. 22.

the father's right even further than the Mitakshara. In the **Mitakshara school** the son acquires an interest in his ancestral estate from the very moment of his birth by reason of which he can demand a partition and get a separate allotment free from any control which the father might otherwise have (r). It is, therefore, evident that the position of a son as to proprietary interest under the Hindu Law was much more advantageous than under the Roman Law, even in its most advanced form (r).

Besides the mutual rights as discussed above, there are reciprocal duties of the father and the son as regards maintenance and payment of debts which will be dealt with in Book II of this treatise

The text which appears to prohibit litigation between a father and a son has been explained by Mitakshara to mean that such a litigation should be discouraged, except in cases when it has to be undertaken in order to secure to them the proper enjoyment of their mutual rights and obligations.

Litigation between father and son.

गुरोः शिष्ये पितुः पुत्रे दम्पत्योः स्वामिभृत्ययोः ।

विरोधेऽपि मिथस्तेषां व्यवहारो न सिध्यति ।

Hindu Law does not seem to prescribe any limitation to such litigation, but it was discouraged between close relations, such as, father and son, preceptor and pupil, master and slave, and husband and wife. Under the Roman Law, a father and a son under his control laboured under a mutual incapacity to sue each other.

In ancient days the relationship between the Vedic preceptor and his pupil was so close that in default of kinsmen one could inherit the property of the other. The power of chastisement was limited in the same way as of the father. The pupil had to render implicit obedience to his Guru and whatever he acquired by his own efforts he had to offer to his preceptor who, in turn, imparted instruction without any remuneration and also maintained him at his own cost and in his own residence

Preceptor and pupil.

It is the duty of the father to maintain and educate his daughters and then to hand them over to suitable bridegrooms before they attain puberty.

Duty towards daughters.

कन्याप्येवं पालनीया शिक्षणीयातिथक्ततः ।

देया वराय विदुषे धनरत्नसमन्विता ॥

When the father is not alive or other guardians neglect to do so,

the girl is to wait for three years after puberty and choose a husband for herself; but in such a case she must not take away with her ornaments which she had received from her parents or brother. The rule of giving the girl in marriage before she attains puberty does not mean that the girl may be given to any person without proper regard as to his qualifications as a suitable bridegroom. Manu (IX, 89) has declared, "It is far better that the girl should remain unmarried in her father's house until she dies, than that she should anywise be given in marriage to a worthless man."

काममामरणात् तिष्ठेत् गृहेकन्यर्तुमत्यपि ।

नत्वेवैनां प्रयच्छेत् गुणहीनाय कर्हिचित् ॥

SECTION 4. DOMINICAL RELATIONS

In ancient days slavery was very common amongst the Romans, the Hindus and other nations. Justinian defined slavery as an institution of the law of nations, by which one man is made the property of another, contrary to natural right (a). Katyayana (cited in Mayukha) explained the term *Dasa दास* to be a person who being free, voluntarily gives himself away to another.

स्वतन्त्रस्यात्मनोदानादासत्वं दासवद्वृष्टुः

Slavery appears to have originated in Hindu Law by a voluntary surrender of a person to another to get subsistence and protection in lieu of services to be rendered. If he offered himself as a son he was a son self-given and attained a higher position; but in case of necessity for maintenance and protection he became a slave if he offered himself unconditionally. Smṛiti Chandrika has explained the difference between a slave and an ordinary servant to mean that the dependence of the former is absolute, he having abandoned all sources of separate and independent earning; while the latter may earn an independent livelihood and his dependence is, therefore, partial, though both work for their master.

According to Manu (VIII, 415) there were seven kinds of slaves or seven distinct modes in which slavery could arise :
Enumeration of slaves by (1) Manu. a man could become a slave—when he (1) was made a captive in war, or (2) offered himself in slavery for subsistence, or (3) was born of a slave woman, or (4) was transferred by a former master by sale or (5) gift, or (6) received by inheritance from the former master, or (7) was made a slave as a punishment by an act of law.

स्वजाततो भक्तदासो गृहजः क्रीतदन्निमौ ।

पौत्रिको दण्डदासश्च सत्तेते दास्योनयः ॥

Narada gives a longer list containing fifteen kinds of slaves : (1) one born in the house (of a slave woman), (2) one purchased, (3) one received in donation, (4) one received by inheritance, (5) one maintained in a season of dearth, (6) one pledged by the master, (7) one released from some heavy liability, (8) one captured in war, (9) one won at a wager, (10) one who having become an ascetic breaks the rules of the order, (11) one who surrenders himself in slavery for a fixed term, (12) one who surrenders himself, (13) one who does so in consideration of receiving food and raiment, (14) one who is rendered a slave by attachment to a slave girl, (15) and, lastly, one who sells himself (b).

These different modes show that slavery arose out of the following causes ;

- (1) by capture in war ;
- (2) by birth from a slave woman ;
- (3) from attachment to a slave woman ;
- (4) from infraction of the rules of the ascetic order ;
- (5) from self-surrender to slavery for some consideration ;
- (6) by way of penalty through an order of court.

The Shastras have clearly laid down that a Brahmin could never be a slave to any one, and that a person belonging to a higher caste could not be a slave of another belonging to a lower caste. The ascetic who becomes a slave owing to the infringement of the rules of the order becomes a slave to the king only. A person forcibly made a slave or purchased from a thief did not really become a slave. So Hindu Law did not tolerate slavery when it had its origin in force or fraud. In such cases the king was enjoined to order his release at once.

Special rules and regulations of slavery.

चोरापहृत विक्रीता ये च दासीकृता यत्नात् ।

राज्ञा मोचयितव्यास्ते दास्यन्तेषु हि नेष्यते ॥

[Narada IV. 38]

On the fulfilment of certain conditions a slave could be emancipated, except when the slavery arose from birth, or from purchase, gift or succession from the previous master, or by purchase for a price. On payment of ransom for his release by a captive of war, or of the expenses incurred for a slave for his subsistence, by giving up connection with a slave girl by a slave who became so on that account, on the expiry of a fixed period, if it was so stipulated, slavery could be terminated. It was not so terminable, except with the consent of the

Conditions of emancipation.

master, when it was due to birth from a slave-girl or contracted voluntarily on payment of a price by the master. Irrespective of the kind of slavery, it was terminable at the option of the master, and there was no restriction imposed upon his right to emancipate, as in Roman Law. The reward of a slave who saved the life of his master from some impending danger was his emancipation, and he was also given a share in the property, as if he were his son (Narada V. 30) :

यश्चैषां स्वामिनं कश्चित् मोचयेत् प्राण शंसयात् ।

दासत्वात् स विमुच्येत पुत्रभागं लभेत् च ॥

This provision shows the broadmindedness of the Hindu jurists by substantial recognition of legal rights.

Some peculiar formalities were prescribed for manumission, such as, taking from the shoulder of the slave a pitcher of water and breaking it down, and sprinkling water on his head together with flower and rice, saying 'thou art no longer a slave', and 'let *him* proceed towards the east.' The exact meaning and sense of this practice is not quite clear, but it may have been meant to give publicity and add impressiveness to the ceremony and invest it with a solemnity preventing future repudiation (x). It was essential to emancipate a female slave with the child begotten by her master.

Formalities of manumission.

Position of a slave under Hindu Law compared with that of Roman Law.

Justinian says, "Slaves are in the power of masters, a power derived from the law of nations: for among all nations it may be remarked that masters have the power of life and death over their slaves, and that everything acquired by the slaves is acquired for the master." (y) Such unrestricted power over the slaves was subsequently curtailed, and Constantine only allowed moderate chastisement to be inflicted upon the slave. But, under Hindu Law, there is no trace of the master having had the power of life and death over his slave, and Manu has distinctly laid down that the master's power for moderate chastisement was hedged in by limitations, *vis.*, that it was to be inflicted in the same way as on the son; and any violation of the rule was punishable by the king. As regards rights to property, it was true that during subjugation a slave could not acquire any property, but his former property did not pass on to his master; thus it could help him in purchasing his liberty. There was also a restriction to the sale of a female slave; the master could not sell her without any fault on her part against her wishes and he was to be punished in case of

(x) Dr. Sen's Hindu Jurisprudence, p. 296

(y) Institutes Lib. I, Tit. VIII.

transgression of this rule, unless he acted under some extreme distress (Katyayana cited in Viramitrodaya on Slavery) :

विक्रोशमानां यो भक्तां दासीं विक्रेतुमिच्छति ।

अनापदिस्थः शक्तः सन् प्राप्तुयाद् द्विशतं दमम् ॥

"The wife, the son, and the slave—all these three are known as incapable of owning property or wealth. Whatever they earn belongs to him, to whom they themselves belong."

भार्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः ।

यत्ते समधिगच्छन्ति यस्य ते तस्य तद्धनम् ॥ [Manu VIII, 416]

"The wife, the son, the slave and the uterine brother if found to be guilty of an offence should be struck with a rope or by means of a bamboo split."

भार्या पुत्रश्च दासश्च प्रेष्यो भ्राता च सोदरः ।

प्राप्तापराधाः ताड्याः स्यू रज्ज्वा वेणुवलेन वा ॥ [Manu VIII, 299]

"Even a transaction entered into by a slave, with a view to the maintenance of the family, whether in a native land or a foreign land, should not be repudiated by the master."

कुटुम्बार्थेऽप्यधीनोऽपि व्यवहारे यमाचरेत् ।

स्वदेशे वा विदेशे वा तं न्यायान्न विचालयेत् ॥

It follows almost as a corollary from the dependent position of a slave that any transaction entered into by him, except when he acted under the direction of his master, was to be treated as void. It was, however, directed that if he did anything for the family of his master at a time of distress, the master was to ratify the same and was to be bound by the obligation created in that matter.

भार्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः ।

यत्ते समधिगच्छन्ति यस्य ते तस्य तद्धनम् ॥ [Manu cited in Day.]

It thus appears that, after all, Hindu Law did not regard a slave as a mere chattel, but as a human being possessing feelings and sentiments which could not be needlessly outraged or deliberately trampled upon.

The text of Manu will remind us of Sir Henry Maine's passage from "Ancient Law" where he says that the governance and representation of the family might under a particular state of circumstances devolve on a bondsman." It also seems that the question raised by Sir Henry Maine as to whether slaves were members of the family or not may be answered in the affirmative, if we were to suppose that in the days of

Manu a slave was on certain occasions entrusted with managing the affairs of the family.

The extracts quoted above are sufficient to show that slaves were regarded in several respects in the same light as a wife or a son. Even as regards the mode of domestic chastisement for offences, the treatment that slaves received can scarcely be said to be hard or inhuman, since that chastisement did not involve any greater severity than that which is usually practised by way of school discipline in the most civilised parts of the world. It is certainly a redeeming feature of slavery as it existed in India, when we remember what Mayne says in connection with the lot of slaves in the ancient European world. According to his opinion, "It is more probable that the son was practically assimilated to the slave than that the slave shared any of the tenderness which in later times was shown to the son. On the other hand, the state of things in the early Hindu society seems to have been that the slave was regarded as a member of the family, that he was occasionally employed to conduct important concerns in which the whole household was interested and that there was a public sentiment prevalent in society which prevented cruelty even when it was thought necessary to administer some punishment to him by way of correction."

As an article of property, the slave was viewed as a biped to distinguish him from the domesticated quadrupeds. Vyas, quoted in Mitakshara, says, "though immovable property and property consisting in bipeds be acquired by man himself, there can neither be a grant nor sale without convening all the sons." From this passage it will be clear that the early Hindu Law classed slaves with important kinds of property.

This leads us to an irresistible conclusion that though the civil rights of a slave were neither large nor varied, yet he enjoyed a certain consideration and a lot which in some respects at least he had hardly reason to deem as more unbearable than that of a son and, therefore, his condition was much better than under Roman Law.

(B) LAW OF DEFECTIVE STATUS

SECTION 5. LAW RELATING TO INSANITY AND MINORITY

The other sources of defective status may broadly be divided into two classes, *viz.*,

- (1) those causing exclusion from inheritance (a),

(a) See Book II,

- (2) those barring freedom in transactions, such as,
 (a) mental aberration,
 (b) dependence,
 (c) infancy.

The Shastras have laid down that a gift made by a person under the influence of sudden fear or uncontrollable rage or the like is invalid. Narada has laid down that such people are for the time being beside themselves, and therefore, although independent, their actions should be regarded as void by reason of the temporary want of freedom.

स्वतन्त्रोऽपि हि यत्कार्यं कुर्यादप्रकृतिं गतः ।

तदप्यकृतमेवाहुरस्वातन्त्र्यस्य हेतुतः ॥

कामक्रोधामिभूतार्त्तमयव्यसनपीडिताः ।

रागद्वेष परीताश्च ह्येयास्त्वप्रकृतिगताः ॥ [Narada I. 40-41]

This is a temporary disability which cannot be deemed to create **Insanity.** defective status. When it becomes more permanent it is insanity and a person afflicted with it becomes incapable of entering into any legal transaction.

Dependence means subordination to superior control. The nature of dependence in the case of sons, wives and slaves has already been explained. There are various degrees of dependence, and in fact it is relative in its character.

Under the Hindu Law there is no criminal liability on a child till the attainment of eighteenth year. From eighth to the sixteenth year he cannot enter into any legal transaction. After this age-limit an infant, though *sui juris*, is not quite free from his parent's control, as expressed by Narada :

गर्भस्थैः सद्दशौ ज्ञेय आष्टमाद्वत्सराच्चिद्युः ।

बाल आषोडशाद्वर्षात् पौगण्डश्चापि शब्धते ॥

परतो व्यवहारः स्वतन्त्रः पितरावृते ।

Under Hindu Law *minority extends till the sixteenth year.* Mayne (at p. 272) says that there is a difference of opinion amongst the Hindu jurists as to the attainment of majority at the beginning or at the end of the sixteenth year, and he has remarked :—"The Hindu writers seem to take the former view and this was always held to be the law in Bengal. The latter point is stated to be the rule in Mithila and Benares, and was followed in Southern India and apparently in Bombay." This ambiguity is due to the particle **आह** which means until and may refer to either limit. Dr. Sen, the learned Tagore Law

Professor, in his treatise at page 300, says, "Having regard to the context, the best interpretation seems to me to lead to the conclusion, that minority extends till the end of the sixteenth year although Sri Krishna Tarkalankara in his commentary on the Dayabhaga appears in one place to take the opposite view."

आप्राप्तव्यवहारा बालकाः पञ्चदशवर्षानधिकवयस्काः ।

The father of a minor has the first claim to be his guardian and the position of the mother is next to him as they are natural guardians; and in their absence the elder brother takes the place.

**Guardianship
of a minor.**

तयोरपि पिता श्रेयान् बीजप्राधान्यदर्शनात् ।

अभावे बीजिनो माता तदभावे तु पूर्वजः ।

The husband becomes the guardian of a girl after her marriage. The king is the protector and ultimate guardian of the minors in his kingdom, as Manu (VIII. 27) has enjoined that when a boy has neither father, nor mother, the king should take steps to protect the property of the boy until he attains majority and returns from the house of his preceptor to take charge of it himself.

बालदायादिकं रिक्त्वं तावद्राजानुपालयेत् ।

यावत् स्यात्समावृत्तो यावच्चातीतशैशवः ॥

CHAPTER III

LAW OF THINGS

SECTION I. OWNERSHIP

From the juristic point of view there are two objects—one, 'persons' in whom a bundle of rights constituting ownership inheres in relation to particular things, and the other, 'things' which are subject to a special kind of control from particular individuals and which may be deemed the property of those individuals. The conception of ownership स्वामित्व is thus based on the distinction between persons and things, and implies a certain kind of relationship between them, the idea underlying the conceptions of ownership and property स्वत्व being fundamentally the same. *Ownership may, therefore, be defined to inhere in persons in relation to things that may be objects of proprietorship, and property may be said to characterise things in so far as they stand related to persons who are their owners.* The inter-relation between the conceptions of ownership and property has been characterised by Hindu jurists as mutual determination निरूप्य निरूपक भाव, and they have expressed the view that a correct way of comprehending them both is to regard the one as the determinant of the other.

Siromani has stated that although ownership inheres in the person and property in the thing in relation to the owner, neither of them fall within the classification of पदार्थ recognised by the Vaiseshikas.

Meaning of ownership and property.

द्रव्यं गुणस्तथाकर्म सामान्यं सविशेषकम् ।

समवायस्तथा भावाः पदार्थाः सप्तकीर्तिताः ॥ [Kārikābālī I. 2]

It only means that the terms ownership and property represent a super-induced relation between the person who owns and the thing that is owned not included within the essential attributes, which characterise the person and the thing respectively ; so that they may not be deemed as attributes (*gunas*) of either the person or the thing. Therefore, the seven-fold division of the Vaiseshikas must be supplemented by an additional category *Atrikta Padārtha* अतिरिक्तः पदार्थः in order to show that the conception of ownership or property is an outcome of social evolution which clothes the persons with a bundle of rights in relation to things which are objects of ownership.

(a). The intricacies of these discussions and the subtlety of logical acumen displayed by these jurists show the high level of their juristic conceptions.

Sri Krishna Tarkalankara in his commentary on Dayabhaga [I. 5] **Term 'property'** has defined the term 'property' स्वत्व to signify स्वत्व defined. *fitness for free disposal as indicated by the Shastras.*

यथेष्ट विनियोगार्हत्वेन शास्त्रबोधितत्वमिति प्राञ्चः ।

On analysis it consists of two elements, viz, (1) that the idea of property is exclusively indicated by the Shastra शास्त्रेन समधिगम्यत्व and (2) that it signifies fitness for free disposal by the person who owns it यथेष्टविनियोगार्हत्वं, which may be treated separately.

(1) Dhareswara, Jimutavahana and their followers hold that the idea of property is exclusively indicated by Shastras and ownership can only be acquired in the modes recognised by them. Vijnaneshwara and his followers, on the other hand, advocate the doctrine that property has its basis on popular recognition लौकिक स्वत्ववाद without any dependence on Shastras and the object of the rules laid down therein about the modes of acquisition of ownership is to collect and prescribe such means by popular usage as are regarded commendable and, as such, worthy of being pursued. The question is of priority as to whether the Shastras merely summarise the modes of acquisition of ownership, which are already recognised in popular usage, or whether the popular usage merely follows and gives effect to the Shastric rules, laying down the conditions for the acquisition of ownership. Jimutavahana supports the latter view while Vijnaneshwara and Mitra Misra advocate the former which appears more reasonable and just.

The votaries of the first school allege that if fitness for free disposal is the characteristic of the conception of property without any reference to the Shastric rules regulating the acquisition of ownership, then the ownership of stolen articles must be ascribed to the thief which are as much within his control as any other things acquired by honest means. The position cannot be saved by saying that the thief cannot freely dispose of his property for fear of detection, as an honest owner's right in this respect is also restricted in the same way, viz., that he cannot set fire to his own house so as to burn the houses of his neighbours. This objection is not valid and correct as it is

Objection to Vijnaneshwara's view : (a) Fitness for free disposal, not a sound test;

altogether wrong to assume that popular usage recognises the thief as the owner of the stolen articles, and then it will be quite futile to seek the assistance of Sastric injunctions to establish that the theft causes no transfer of property, and thus temporary loss cannot be held to deprive one of ownership.

The second objection that the Sastric rules become unnecessary is also not tenable as a scientific presentation of such rules is not without its value, it being an admitted fact that a good portion of what is called positive law consists of rules collected from popular usage set forth in a well defined and systematic form. The specification would also serve the purpose of enunciating the approved methods of acquisition of ownership and of indirectly reprobating those that are opposed to directions contained in the texts of Sastras.

The growth of the system of ownership is an outcome of social evolution and not a deduction from Sastric injunctions which are not creative but partly illustrative, and partly regulative in their character. They indicate what courses should not be pursued by persons belonging to the several castes in their endeavour to acquire property.

This difference of opinion resolves itself into a question regarding the relative priority between the unwritten rules observed in popular usage and the written rules inculcated and systematised in authoritative works on positive law. In the order of evolution, the unwritten rules evolved by the popular mind occupy a prior position although they may be subsequently moulded and modified by written works of acknowledged authority. This is the opinion of the majority of the Hindu jurists.

Fitness for disposal, the first alleged characteristic of property has been discussed above, and now the special significance of the word "fitness" should be observed with great care. In actual practice it is found that the disposition of property by the owner is not absolutely capricious, but is regulated to some extent by the motives furnished by the control exercised by the Sastric injunctions. Hence, it follows that although in practice one's dealings with one's property are regulated by various considerations, yet the word 'property' in its fullest sense cannot signify fitness for free disposal by the owner. According to Dr. Holland also ownership implies a plenary control by one over an object. On the other hand Viramitrodaya observed that his proprietary rights did extend to invest him with the power of acting according to his pleasure in relation to his property.

A practical aspect of this characteristic element in the conception of property will be found in the above quoted dictum of Jimutavahana

that a fact cannot be changed by even a hundred texts.

Though absolute owner of the property—ancestral or self acquired, a father, by certain texts is prohibited from alienating certain kinds of property without the consent of his sons, but this prohibition cannot have the effect of invalidating an alienation by the father in violation thereof, because the alienation becomes operative by reason of the ownership which inheres in the father to the exclusion of his son.

Austin has defined the term *property* or dominion as being “applicable to any right which gives to the entitled party an indefinite power or liberty of using or dealing with the subject.” Similarly, Dr. Holland has defined ownership as ‘a plenary control over an object’ and has also pointed out that it must always be enjoyed in such a way as not to interfere with the rights of others. Dr. Sen also (at p. 49) in his learned treatise has remarked, “It is hardly necessary to point out how closely these definitions approach the view of the Hindu jurists The resemblance is not confined merely to the definitions, but also extends to the limitation indicated in the latter part of the passage quoted from Dr. Holland’s Jurisprudence, for this limitation is ultimately reducible to the control exercised by the king and by the Sastric injunctions, which is fully recognised by the Hindu jurists.”

Hindu jurists acknowledge the existence of qualified ownership of property. The unfettered power of using or dealing with one’s own property which constitutes ownership in its strictest sense is susceptible, under special circumstances, of being limited to or circumscribed by various causes. This restriction upon the right of free disposal may even go so far as almost to deprive the owner of his right of alienating the property according to his choice, *e.g.*, a Hindu widow is undoubtedly the owner of the property inherited from her husband, but she cannot freely dispose of it except in cases of legal necessity. Her ownership is ordinarily limited to the right of enjoyment without detriment to or destruction of the corpus. This kind of qualified proprietorship is said to imply fitness for enjoyment **भाग्ययोगि स्वत्व** as distinguished from fitness for free alienation.

Srikrishna Tarkalankara recognises the existence of various rights to one and the same thing being vested in different persons provided there be no incompatibility in the co-existence of such rights. He also distinguishes between property of the same kind and of different kinds and maintains that different kinds of property cannot inhere in the same person **सजातीयस्वत्वं प्रति सजातीयस्वत्वविरोधि** ; but there is no such

Qualified property.

incompatibility in the co-existence of different kinds of property in relation to the same thing residing in different individuals. The subordinate elements of ownership constituting '*Jura in re aliena*' may be transferred to different individuals, while the residuary right of ownership may remain where it was. One of the best illustrations of this is furnished by the king's right in the soil, as given in the Viswajid

King's right in the soil.

Adahukarana of the Mīmāṃsā. This view has also been supported by Nilkantha in his Vyavahara Mayukha and by Śiṣikrīṣṇa Tarkalankara that the landlords, *dhōmnikas*, are the real owners of the soil and the title of the king is limited to the right of collecting revenue from them by reason of the protection which he affords to them in the peaceful enjoyment of their property. Jagannath's view that the subjects are mere lessees from year to year finds very little support from the Dharma-shāstras which, though ascribing divine character to the sovereign, do not anywhere lay down that the king can freely deal with the lands in his kingdom contrary to the settled rights of his subjects.

The Dharma-shāstras describe some of the means of acquisition of ownership; but it should be noted that the enumeration of these means contained therein was not meant to be exhaustive. Hence, we find

Shāstric means of acquisition of ownership.

different law-givers giving different enumerations which do not exactly agree. **Manu** (X, 115) for instance, says, "There are seven virtuous means of acquisition of wealth, — inheritance, gain, purchase, conquest, application (of wealth), employment of work and acceptance of gifts from proper persons "

सप्त वित्तागमा धर्म्या दायो लाभः क्रयो जयः ।

प्रयोगः कर्मयोगश्च सत्प्रतिग्रह एव च ॥

Gautama (CII X) declares that ownership arises from (1) succession, (2) purchase, (3) partition, (4) occupation (of unappropriated property) and (5) finding (of hidden treasures or the like), to which may be added (6) acceptance of gifts in the case of Brahmins, (7) conquest in the case of Kshatriyas, (8) commerce and agriculture in the case of Vaisyas, and (9) wages of labour in the case of Sudras

Narada enumerates these with detail, *viz.*, succession, gifts of affection, and marriage presents received with the wife, these are common to all the castes; three special sources in the case of Brahmins which are free from stain, *viz.*, acceptance of free gifts, performance of priestly duties and receipts from disciples; in the case of Kshatriyas, revenue, gains of war and penalties of law; in the case of Vaisyas, agriculture, herdsman'ship and commerce; and in the case of Sudras, the service of the above three castes. Dharma-shāstras lay down

certain modes of acquiring ownership in the case of particular castes, but it does not imply that any violation thereof will affect the right of ownership. A Brahman may take up the profession of a cultivator and the product will be his own property. According to Jimutavahana 'A fact cannot be altered by a hundred texts,' which means that such conduct as leads to confusion of functions among several castes is abominable, unless justified by pressing need, and should be avoided as far as possible.

Some of the specific modes of acquisition of ownership would now be taken up, and the first is *parigraha* or *occupatio* (of Roman Law) which means appropriation. It is one by which ownership is acquired in respect of a thing which had no previous owner. Viramitrodaya (in Ch. on Partition I. 13) has explained it as expressing the appropriation of previously unappropriated property, such as, straw, water, logs of wood, *etc.*, from a forest which is open to the public not being under the ownership of any particular individual. परिग्रहः पूर्वमपरेणास्वीकृतस्यावययादि साधारण प्रवेश सम्बन्धिनस्तृण जल काष्ठैः स्वीकारः ।

This definition shows that *parigraha* is only possible when the things are not already under the ownership of somebody else and it does not limit the extent of *parigraha*. It seems that at the time this work was written older examples of its operation had become obsolete. The traces of the origin of this form of ownership which in Roman Law, is called *occupatio* also appear in the text of Manu (IX, 44) which shows that the view was taken from the past. "Those who were versed in the ancient lore regarded this earth as the wife of its first king Prithu, and declared that the field belonged to him who reclaimed it and the (hunted) animal to him whose arrow struck it down."

पृथोरपीमां पृथिवीं मादर्यां पूर्वविदोविदुः ।

स्वाणुञ्जेष्वस्य केदारमाहुः शल्यवतो मृगम् ॥

This is the reason why our ancient law-givers deal so cursorily with this subject. It may be pointed out that Manu ascribes ownership to the person whose arrow strikes down the hunted animal irrespective of the land on which the game is killed, and it resembles the Roman Law, but not the English Law, where a person killing an animal on another's land will not be treated as the owner but a trespasser. Manu (IX. 49, 53) also discusses the ownership of cultivated lands, both arising originally from the reclamation of previously unappropriated waste lands, and as between the person to whom the

field belongs and another who sows his seeds in it. According to him the crops belong to the former, in the absence of a special contract under which both may become sharers in the produce :

येऽक्षेत्रिणो बीजवन्तः परक्षेत्रं प्रवापिणः ।
 ते वै शस्यस्य जातस्य न लभन्ते फलं क्वचित् ॥
 क्रियाभ्युपगमात् त्वेतद् बीजार्थं यत्प्रदीयते ।
 तस्येह भागिनो दृष्टौ बीजीक्षेत्रिक एव च ॥

[Manu IX. 59]

This proposition may be compared to the well-known maxim '*quicquid plantatur solo solo cedit.*' Sir William Markby observed : "We find an example of occupancy without ownership in the (so-called) Institutes of Manu. The ownership of cultivated land (as distinguished from the homestead and the pasture attached thereto) is not mentioned in that work; and as there are no rules as to how such land is to be disposed of when the family breaks up, it seems clear that when that book was written it was not owned, but only occupied." In face of the authority of Manu, the above remarks are quite wrong and out of place. They are the result of the fact that this learned foreign author had no first-hand knowledge of the subject and, therefore, his remarks in this respect must be taken with caution.

The Mitakshara describes a treasure-trove निधिः as भूमौ चिर निर-
 पातस्य सुवर्णदिनिधिः। Viramitrodaya explains it as the finding of the hidden

II. Adhigam- treasure-trove.

अधिगमोऽज्ञातस्वामिकस्य निभ्यादेः प्राप्तिः। Yajnavalkya has laid down the law thus : "If the king discovers the treasure-trove, then he will take half and distribute the other half among Brahmins; if a learned Brahman finds it, then he may keep the whole himself; in other cases, the king will give five-sixth to the finder, and take the rest himself; but if the finder does not bring the fact to the notice of the king, then he will, on coming to know of it, extract the whole and also punish the finder."

राजा लब्धं निधिं दद्यात् द्विजेभ्योऽर्धं द्विजः पुनः ।
 विद्वान् अशेषमादद्यात् स सर्वस्य प्रभूर्यतः ॥
 इतरेण निधौ लब्धे राजा षष्ठांशमाहरेत् ।
 अनिवेदितं विज्ञातो दास्यस्तं दण्डमेव च ॥

On the authority of Manu (VIII, 35) the Mitakshara has laid down that even in such a case if the real owner comes forward and establishes his title, the king will restore the treasure to him after

retaining one sixth or one-twelfth for himself or, according to Nilkantha, one fourth for himself and one-twelfth for the finder. It therefore shows that treasure trove was not treated as *res nullius*, and though it remained unclaimed for a long time, ownership of the real owner could not be extinguished and the presumption of abandonment could be rebutted by the real owner. But the Roman Law provided that if the finder was the owner of the land where it lay hidden, he could keep the whole, if another person found it, the treasure was to be divided equally between them. From these texts of Yajñavalkya we may deduce the following propositions —

(a) If a member of any caste other than a Brahman finds *Nidhi* he must inform the king and after delivering its sixth part to the king, he may keep the rest for himself.

(b) If the finder mentioned in the above proposition fails to send information, he must pay fine over and above the king's share.

(c) If the king himself is the finder he may retain half for himself, the other half must go to the Brahmans.

(d) If a learned Brahman is the finder he may retain the whole. The latter two propositions (c) and (d) were retained by the Mitakshara which has interpreted verse 34 इतरेण निधौ लब्धे राजा षष्ठांशमाहरेत् in its natural meaning that if any person other than a learned Brahman may find the treasure-trove the king should take one-sixth and give the rest to the finder. इतरेण तु विदुः ब्राह्मणातिरिक्तेन निधौ लब्धे राजा षष्ठांशमाहरेत् which should have been the correct interpretation. But in order to bring the text in conformity with the text of Vashishtha and Manu, पिता gives the word आहरन् the sense of giving and therefore Vijnaneshwara comments that the king should give one-sixth to the finder. इतरेण निधौ लब्धे राजा षष्ठांशमपि भागं दत्त्वा शेषमाहरेत् । If the treasure is found by any person other than a Brahman let the king give 1/6th part to the finder, and keep the rest himself. After the comment on the above text Vijnaneshwara quotes in support the text of Vashishtha as under

आप्रह्वापमार्गं विस्रं योऽधिगच्छेद्राजा तद्वन् ।

षष्ठांशमपि गन्धे दद्यात् ।

Gautama says that the king is the owner of the treasure trove but not of that treasure which is found by a Brahman, if the finder other than a Brahman conceals it, even then he is entitled to one-sixth.

निर्ध्वर्षिगमो राजघनं भवति । न ब्राह्मणस्वमितरस्य
सब्राह्मणोऽस्यात्वा षष्ठमंशं लभतइत्येके ।

Whoever, having found out a treasure-trove, did not inform the king and was found out by the king, he should be made to pay the entire treasure found and also a fine according to his capacity

If, however, the owner of the treasure-trove appears afterwards and establishes his ownership by specifying the amount, then the king should give him the treasure after deducting for himself a sixth or twelfth part says Manu (VIII 35)

ममायमितियो ब्रूयात् निधिं सत्येन मानवः ।

तस्याददीत षड् भागं राजा द्वादश मेव वा ॥

The choice as to the particular portion is to be determined by reference to the class to which the party belongs, and the time that had intervened

Under the English Law neither the finder nor the owner of the land had any claim to the treasure-trove but it belonged entirely to the king and it was an offence not to give any notice of its discovery Hindu Law has combined the rights of the king to unclaimed property in his dominion with the natural expectations of the finder, while both the English and the Roman Laws have failed to acknowledge the just claims of the finder and the occupier of the land

The difference between lost wealth and the treasure-trove is that in the latter all hope of finding the owner is lost, while in the former it is not so

III. Lost wealth

Commenting on the verse of Yajnavalkya [II 33.],

प्रनष्टाधिगतं देयं नृपेण धनिने धनम् ।

विभावयेन्न चेद्विज्ञैस्तत्समं दण्डमर्हति ॥

the Mitakshara says that the lost wealth, such as gold, recovered by the revenue or police officers, and offered to the king, should be given by the king to the owner if the latter identified it by supplying proper marks of identification such as the quality, quantity, *etc*, if he does not identify, then he should be fined in an equal amount for setting up an untrue claim This refutes the presumption of ownership which may arise on account of *Adhigam* अधिगम being recognised as one of the causes giving rise to ownership

Here, moreover, Yajnavalkya lays down the period of time also .

शौलिकैः स्थानपालैर्वा नष्टाय हत माहृतम् ।

अर्वाक् संवत्सरात्स्वामी हरेत् परतो नृपः ॥

Manu has laid down three years as the period.

प्रणष्टस्वामिकं रिक्तं राजा अर्धं निधापयेत् ।
अर्वाक् व्यवदाधरेद् स्वामी परतो नृपतिर्हरेत् ॥

From these texts it is clear that lost wealth must be preserved for three years. If the owner comes within a year the whole should be returned to him. If he returns after more than a year in that case after deducting some portion as preservation charges, the remaining should be made over to him.

आवदीतायषड्भागं प्रणष्टाधिगतान् नृपः ।
दशमं द्वादशं वाऽपि सतां धर्ममनुस्मरन् ॥

[Manu 33]

In such a case, says Vijnaneshwara, in the first year the whole would be given, but in the second after deducting the 12th portion, in the 3rd a tenth, and a sixth in the fourth and in the following years, after which the king shall retain it इत्ये परतो नृप. This only refers to the injunction to expend it in case its owner does not appear within three years, but if the owner appears, it must be returned to him even if expended.

The subject will remain incomplete if we do not consider the rights of the finder of the property. The Mitakshara states :

राजभागस्य चतुर्थांशोऽपि मन्त्रो दातव्यः

But if the owner does not come and claim, then the finder will get one-fourth of the whole and the king shall retain the rest ;

स्वाम्यनागमेतु तस्मिन् धनस्य चतुर्थांशं यदि गन्त्र दत्त्वा शेषं राजा गृह्णीयात् ।

Gautama also supports the same view

तथाह गौतमाः—प्रणष्टस्वामि भूमावपिगम्य सम्यत्सरं राजा रक्ष्यमूर्ध्व
मधिगन्तुश्चतुर्थांशो राज्ञः शेष मिति ॥ अथ संवत्सर वचनमभिव्याप्येतम् ॥

On the other hand the king must restore the property which was stolen and was then seized by the police uninjured to the legitimate owner (Manu VIII, 40 ; Yaj. 36.) :

देयं चौर हृतं द्रव्यं राज्ञा जानपदायतु ।

अददद्धि समामोति कित्तिवर्षं यस्य तस्य तत् ॥

चौर हृतं द्रव्यं चौरैर्मन्यो विजित्य जानपदाय स्वदेशनिवासने यस्यतत्
द्रव्यं तस्मै राज्ञा दातव्यम् ॥

If the king appropriated it, the sin of the thief is visited on him.

दातव्यं सर्वं सर्ववर्णैभ्यो राजा चौर हृतं धनम् ।

राजा तदुपयुज्जानाद् चौरस्याप्नोति क्लिबिषम् ॥

If the king cannot succeed in recovering the property from the thief, he should compensate the owner from the treasury.

अथ चौर हृताहरणाय यतमानोऽपि ।

न शक्नुयादाहर्तुं तदा तावद्धनं स्वकोशात् दद्यात् ॥

[Pita.]

A fourth of the royal share should be given to the finder. Where, however, the owner does not turn up, a fourth of the entire property should be given to the finder and the remainder may be taken by the king.

The rule regarding **विजित** — conquest in war under Hindu Law

IV. **Bijita—conquest of war.**

is that the conquest is an independent source of acquisition of ownership, but it does not sweep away all private rights; it only invests the victorious king with the rights of the vanquished king, his right so far as the property of the subjects is concerned extends only to the right of collecting revenue from it. Yajnavalkya says, "A king bringing under his control a foreign territory becomes subject to the very same duties as are cast upon him in protecting his own state." According to Roman Law it was treated as *res nullius*, so the victorious party could deal with it in any way it liked, and no private rights could be set up against it. It is clear that this *loot* was not recognised in Hindu Law which was less indulgent to the ferocity and cupidity of combatants and took every care of the feelings of private individuals among the conquered subjects. It is only sad to note that it was not so noticed by Sir Henry Maine when he glibly talked in his treatise of the feeble civilization of the Hindus.

Prayoga or its equivalent, *accessio*, in Roman Law or the produce

V. **Prayoga—accessio.**

of the pre-existing property is also a source of acquisition of ownership. The produce of a field or the offspring of an animal or accession to the land all belong to the owner, unless there is an agreement modifying the general rule. Dr. Sen says (p. 62): "If a river which flows between two villages and forms the boundary between them encroaches upon one bank and attaches newly formed land to another, then the owner of the bank on which the formation takes place becomes entitled to it as an accretion to his property; this sort of gain is characterised by Vrihaspati as a gain due to good fortune; he also lays down an exception to the rule, and says that where by the force of the current

of a stream a field with crops standing on it is detached from the main land, there the rights of the original owner remain unaffected by the change; on this the Viramitrodaya observes that the exception only applies to the standing crops and after they are reaped the rule of accretion holds good; where, however, there is no question of accretion and the river after having inundated the land on its bank again recedes, there, Narada says, the former ownership continues over its old site, its position being determined, in the absence of old land marks by inference based upon other evidence."

Another question of accretion is with regard to the building of a house upon the land of another with one's own material. Narada has laid down that a person who pays rent of the land to the owner shall take away the material with which he built his house, but in case when no rent is paid or there is no contract for its removal, the owner of the land will remain its owner also on his eviction. These rules are more humane and just in comparison to those of Roman Law on the subject.

Karmayoga or the employment of work or the receipt of remuneration for work done is also a source of acquisition of ownership; it is the result of a sort of contractual obligation which will be treated in Chapter IV.

VI. Karma-yoga or employment of work.

The object relating to the modes of acquisition of ownership has been discussed so far; now let us see what are the modes of transfer of ownership. They may be: (1) by a voluntary act on the part of the owner with or without consideration, *i.e.*, by sale or gift (2) by an omission on the part of the owner, *i.e.*, by prescription; and (3) lastly, by an act not depending on any voluntary act or omission on the part of the previous owner, *i.e.*, by succession

SECTION 2. GIFTS

Gift is the renunciation त्याग by the owner of proprietary right in favour of a sentient being having the result of extinguishing the ownership of the donor and creating that of the donee—स्व स्वत्व-निवृत्तपूर्वपरस्वत्वापसिफलकचेतनो-द्देशपूर्वक त्यागोदानम्

Gift defined.

The essentials of a valid gift are that there must be a donor दाता, a donee, (प्रतिग्राही) a proper object of gift (दातव्य) and a transaction involving certain formalities.

The question often arises whether the renunciation alone on the part of the donor without a corresponding act of the donee of accepting the gift स्वीकार would complete the ownership of the donee. Jīmūṭayābhāṇa maintains that ownership is not created

by acceptance on the part of the donee but by gift on the part of the donor.

It is liable to be defeated by the refusal of the donee to accept the gift, or to be perfected by his acceptance thereof, so that in the interval between the gift and its acceptance or non-acceptance, as the case may be, the donee is vested with an inchoate ownership that is either perfected or defeated by the donee accepting or refusing the gift. Jimutavahana refers to a grammatical rule that the word *datri* or donor formed by annexing *tri* to the verb *da*, meaning to give, must signify the person by whose act the giving is completed ; and that this word signifies the agent on whose action depends the completion of the act implied by the verb. The Sanskrit word for acceptance is स्वीकार, which means the inclusion into one's property of a thing which was not so before ; it does not mean that the subsequent acceptance by the donee of the property gifted would complete his ownership or its transfer. The main objection to this view is that at the time of gift it cannot be said with certainty whether it will be accepted or not by the donee, so the completion of transfer of ownership rests upon an uncertain contingency. Hence it cannot be said that gift alone on the part of the donor is sufficient to complete it. It comes to this that gift is not the sole cause of transfer, but स्वीकार प्रागभाव or subsequent acceptance. It may be held to be an auxiliary cause. In one way, however, it can be said that the donee is not invested with ownership until acceptance. A real difficulty which crops up is, in whom does the ownership inhere during the *interim* period of gift and its acceptance or non-acceptance. Does it become *res nullius*, i. e., property of nobody ? Viramitrodaya has answered this question that although the donor has lost his ownership, yet he does not lose his right of custody परिपाल नीपल रुपस्वत्य by which excepting the donee every one else is prevented, as against the donor, from taking possession of the property gifted. If it be assumed that the donee has become the owner, although he may not be knowing about it, it will have to be said on his refusal to accept the gift that the ownership did arise only to be extinguished on his non-acceptance ; an admission which would involve the fault of complexity of assumptions गौरव.

But the view of the Mitakshara school seems to be that gift itself is incomplete without acceptance, or that the donor can divest himself of ownership over the thing gifted, but he cannot at his option invest another person with ownership without the latter's consent, so in the interval between

**Jimutavahana's
view : accep-
tance not essen-
tial.**

**Mitakshara
view : accep-
tance necessary.**

gift and acceptance or non-acceptance, as the case may be, it does not become the property of the donee. These discussions show the logical subtlety and legal acumen of the Hindu jurists.

The Mitakshara (x) says, "Gift consists of the extinction of one's own property, and the generation of another's property, and if that another *accepts*, then, and not otherwise, the generation of another's property becomes complete (or effectual). The acceptance again, is threefold namely, *mental, verbal, corporeal*: mental acceptance consists of the utterance of the concept of relation (between himself and the thing given as owner and property), by an expression like—'This becomes thine,' but corporeal acceptance is manifold, consisting of receipt or touch (of the thing given), or the like." Mental acceptance consists of a determination of the mind treating the property as one's own. It may be presumed from the silence of the donee. Verbal acceptance is that mental state which finds expression in words denoting the acceptance of gift. Corporeal acceptance is constituted by the assumption of possession or some kind of corporeal control over the thing gifted. As regards movable property, all the three kinds of acceptances may take place at a time, but in the case of immovable property there can be no corporeal acceptance without some enjoyment of the produce,

The Mitakshara also observes, "in the case of land, as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some possession; otherwise the gift, sale or other transfer is not complete." A title, therefore, without corporeal acceptance is weaker than a title accompanied by it. Or the interpretation may be thus: 'Evidence is said to consist of documents, possession and witnesses.' This having been premised as the general rule, the texts 'a title is more powerful than possession unaccompanied by hereditary succession' and 'where there is not the least possession, there a title is not sufficient,' have been propounded to point out to which the superiority belongs, where the three descriptions of evidence meet.' These extracts clearly show that Vijnaneshwara laid down that possession was not absolutely essential to constitute a valid gift, but at the same time, it must be noted that a gift unaccompanied by possession is of a very risky kind, as in case of conflict between two apparent titles, in the absence of any evidence to the contrary, that which is accompanied by possession must prevail (y.)

(y) Dr. Sen's Hindu Jurisprudence, p. 7. 1.

(x) Yajñavalkya II, 27.

Under the Roman Law, property could not be transferred by mere agreement unless it was accompanied by delivery of possession, *Traditionibus et usucapionibus, non nudis pactis dominia transferentur* (s). Under the Muslim system of jurisprudence also, a gift is invalid without delivery of seisin. Thus it is evident that the ancient Hindu jurists clearly grasped the correct relation between alienation and transfer of possession which has escaped the analysis of some of the modern European jurists.

As regards immovable property, the Mitakshara lays down some further formalities for performance. "Land passes by six formalities; by consent of co-villagers, of kinsmen, of neighbours and of heirs, and by gift of gold and water" This text has been explained thus, "that the consent of the co-villagers is required for the publicity of the transaction, since it is provided that 'acceptance of a gift, especially of land, should be public; but the transaction is not invalid without their consent; and the approbation of neighbours (residing near the boundary) serves to obviate any dispute concerning the boundary." The formalities of a 'mancipatio' under the Roman Law which was the mode of conveyance by which *Res Mancipi*, including land and some other commodities of high value, were transferred before Justinian, would be very much similar to those prescribed under the Hindu Law. Sir William Markby observes with regard to five witnesses besides the actual parties in a Roman *Mancipation*, that the number is 'not to be referred to the imperfection of oral testimony, but to the requirement that the transfer should take place in the presence of and be consented to by the community at large, whom these five persons may be taken to represent.' Similar is the case in Hindu Law. Moreover, the explanations of the Mitakshara are of the age of the progressive state of society which had outlived the stage of communal ownership: so the remarks of Mayne that these requirements might probably be the relics of a still older system in which the rights of a family in their property were limited by the rights of others outside the family are merely imaginative.

Kinship and heirship may or may not involve co-ownership, but the consent of kinsmen and heirs has been insisted upon to avoid future dispute. The transaction will be valid even without their consent. Apararka [in chapter on Datta-pradanika] says that the object of requiring the consent of such kinsmen is to indicate that where they are

Comparison with other systems of law.

Other formalities: consent of co-villagers and neighbours.

Consent of kinsmen and heirs.

not unfit or indifferent, an alienation of immovable property should be made in their favour and not in favour of strangers. दानादियोग्येषु विभक्तेषु दायामेषु सत्सु तेभ्य एव स्थावरमर्पणीयमयोग्येषु निरपेक्षेषु वान्ऽपेक्ष्यः

It may however be remarked that the effect of the absence of that consent will depend upon the nature of the co-ownership which has been very differently conceived by the Mitakshara and the Dayabhaga schools. According to the former, an alienation of the joint property or any portion thereof without the consent of the other co-parceners is generally regarded as invalid, while it is not so under the latter school of Hindu Law.

The Mitakshara says : " since the sale of immovables is forbidden (" In regard to the immovable estate, sale is not allowed ; it may be mortgaged by consent of parties interested ") and since donation is praised (" Both he who accepts land and he who gives it are performers of a holy deed and shall go to a region of bliss ") if a sale must be made, it should be conducted for the transfer of immovable property in the form of a gift, delivering with it gold and water (to ratify the donation)." It only shows that the old formalities continue to stick even after the ground of their origin has ceased to exist. Under the early Hindu Law sale of immovable property was not allowed, but under the growing exigencies of the community such sales came to be tolerated, and it was made to resemble in its form an act of free gift, which purpose was served by the accompaniment of gift of gold and water by the vendor which solemnised the ratification of a gift. This assimilation of a sale to an act of gift has got its parallel in the Roman *Mancipatio*. In Hindu Law a sale was assimilated to an act of gift, while in Roman Law gift was made to resemble an act of sale.

The other factors of a valid gift may now be discussed. The definition of a gift, as given above, as well as the fact that a gift is not complete without acceptance, gives rise to the proposition that the *donee must be a sentient being in existence at the time of the gift*. This rule has not been laid down in so many words by any Hindu law-giver. The Judicial Committee of the Privy Council has, however, very authoritatively laid it down in *Tagore v. Tagore* (9 B. L. R. 399 ; s c. 18 W. R. 359). The rule insists on the existence of the donee as a sentient being capable of accepting the gift at the time of the gift, and not at any future time. A gift is a complete conveyance and not a mere promise to convey, and so the donee must be in existence on the date of the gift, which is a logical inference from the very nature of the transaction. There are, however, some apparent exceptions to this

Exceptions. rule, e.g., a child in its mother's womb, a son adopted after the death of the donor under an authority from him and the trustees for the establishment of an image and worship of a Hindu deity.

In the last case, the dedication to an idol is really a dedication to the deity, and the idol is only the visible image through which the deity is supposed specially to manifest itself by reason of the ceremonies of consecration. Therefore, the dedication is in reality in favour of the ever-existent deity and consecration only gives a local habitation to the deity in order to facilitate worship by those who require the help of symbols to aid their devotion.

In Hindu codes and commentaries, gifts fall under the title of *dattasya*, *napakarma* or *dattapradanikam* or resumption of gifts or retraction of promises. Gifts are divided into four classes, namely,

Classes of gifts.

- (1) देय what is fit to be given, or a *proper* gift ;
- (2) अदेय what is unfit to be given, or an *improper* gift ;
- (3) दत्त what has been irrevocably given, or *irrevocable* gifts, and
- (4) अदत्त what although given is in contemplation of law not given, or *void* gifts.

A thing is fit to be given when it is the property of the donor and there is no Shastric prohibition or, in other words, unfitness to be the object of a gift may arise either from want of title in the donor or existence of prohibition in the Shastras. Narada says, "The sages declare that a person cannot, even when placed in distressful calamities, make properly a gift of (1) a thing entrusted to him by its depository, or (2) borrowed (by him from another), or (3) pledged (to him), or (4) what is joint property (of himself and his co-parcener), or (5) what is deposited (with him by another), or (6) his son, or (7) wife, or (8) entire property, or (9) what has been promised (to be given to another)."

The Mitakshara interprets this text to mean that it is intended to enumerate the subjects of *improper* gift, but not to indicate want of ownership ; as the ownership does exist in son, wife, entire property and what is promised. It is, therefore, evident that a gift of these though improper may be valid in those cases in which the donor is the owner. Yajnavalkya's text—"The acceptance of a gift shall be public, specially of immovable property"—has been explained by the Mitakshara thus, "In this text the sages declare that the acceptance of property of which the gift is improper should be publicly made by the donee." It, therefore, safeguards the interest of a *bona fide* donee without notice. When a person is not the owner of the thing,

a gift made by him will not only be infructuous, but will also render him liable to punishment. It is remarkable to note that in some cases where there is no question of the absence of ownership, such as (1) gift of property without keeping enough for the maintenance of the family, or (2) gift of *entire property* when there are children to be provided for, and (3) gift of a thing promised to another, such directions involve no more than a moral injunction and a breach thereof cannot be a ground for holding the gift totally invalid.

Resumption of gifts is one of the eighteen titles of law according to Hindu law-givers. A gift once made cannot be revoked is the rule [Manu IX. 47]:

Resumption of Gift.

सकृदंशो निपतति सकृत्कन्या प्रदीयते ।

सकृदाह ददानीति त्रीयेतानि सतां सकृत् ॥

Hence the necessity of mentioning the instances under which gifts when made are no gifts and can be revoked.

The things which can be given and those that may not be given and what are valid and invalid gifts are categories peculiar to Narada and Vrihaspati.

According to Vrihaspati what may be given is of one kind only and that is what is left of the property after the expense of maintaining the family has been defrayed. But by giving anything more, a house-holder will incur sin :

कुटुम्बभरणात् द्रव्यं यत्किञ्चिदतिरिच्यते ।

तद्देयमपहृद्वान्यत् कुटुम्बी दोषमामुयात् ॥

What may not (cannot) be given according to Narada and Vrihaspati is eight-fold. As Narada observes :

अन्वाहितं याचितकमाधिः साधारणं च यत् ।

निष्क्षेपः पुत्रदारं च सर्वस्वं चान्वये सति ॥

आपत्स्वपि हि कष्टास्तु वर्तमानेन देहिना ।

अदेयान्याहुराचार्या यन्वान्यस्मै प्रतिश्रुतम् ॥

A deposit, a pledge, joint property, a son, a wife, the whole property (by one) who has offspring, and what has been promised to another man, these have been declared by the sages as things which cannot be given even in the worst plight. Valid gifts are seven-fold according to Narada and Vrihaspati. Narada observes :

पयमूत्यभूतिस्तुष्ट्या स्नेहात् प्रत्युपकारतः ।

‘कीमक्यानुग्रहार्थं’ च दत्तं सप्तविधं स्मृतम् ॥

The price paid for merchandise wages, (a present offered) for an

amusement, (a gift) made from affection, or for gratitude or for sexual intercourse with a woman and a respectable gift, are the seven kinds of valid gifts.

The unfitness of a thing for being the subject of gift may be due either to want of title in the donor or to a mere prohibition in the Shastras ; in the former case the gift is invalid and infructuous, while in the latter it is legally operative, but the act will be treated as sinful and punishable. Jagannatha, supporting the latter view, says : "That a thing may not be given denotes that the gift is attended with sin, for this form of speech bears the sense of the imperative. It does not denote that the gift is a void act ; were it so, it would not differ from a void donation ; and full dominion would not be noticed under this title of 'what may not be given'. The gift of things which are enumerated among those which may not be given is punishable ; gifts enumerated among those which are void are utterly null." Therefore, for a valid transfer it is necessary that the transferor should have full dominion over the property, and he should have full capacity to enter into a legal transaction and that the transaction itself should be properly and legally performed irrespective of any prohibition laid down in the Shastras.

Narada (IV, 8) says : "They who know the law of gifts declare that (1) things once delivered as the price of goods sold, as (2) wages for the pleasure (of hearing poets, musicians or the like), from (3) natural affection, (4) as a return for a benefaction, as (5) a nuptial gift to a bride or her family and (6) through regard for religious merit, cannot be revoked."

Irrevocable gifts.

पण्यमूल्यं भृत्यस्तुष्टया स्नेहात् प्रत्युपकारतः ।

स्त्रीशुलकानुग्रहार्थं तु दत्तं दानविदो विदुः ॥

There is some sort of consideration in return for these gifts, so they have been held to be irrevocable.

Narada (IV. 9, 10, 11) in enumerating sixteen sorts of void gifts says, "What has been given by men oppressed with fear, anger, or intense grief ; or as a bribe, or in jest, or by mistake, or through any fraudulent practice ; what has been bestowed by a minor, an idiot, a person under duress, one whose mind is unsettled by disease, one intoxicated, or insane ; what has been given in consideration that the donee will do some service in return, (which, however, he has not performed) ; what has been given through ignorance to a bad man who pretended to be good, or for a righteous undertaking (where none was really

Void gifts.

contemplated); these (though given) are declared as not given."

अदत्तं भयक्रोधशोक्रवेगरुगन्धितैः ।
 अथोत्कोचपरीहास-व्यत्यासच्छ्रुतयोगतः ॥
 बालमूढास्वतन्त्रार्त-मत्तोन्मत्तापवर्जितम् ।
 कर्त्तापमायं कर्मेति प्रतिलाभेच्छया च यत् ॥
 अपात्रं पात्रमित्युक्ते कार्ये वा धर्मसंयुते ।
 यद्वत् स्यादविज्ञानाददत्तमिति तत्स्मृतं ॥

This enumeration may be ascribed to two main causes: (1) want of capacity of the donor, and (2) want of reality and freedom in respect of the act of gift. The first one implies temporary disabilities in the donor, such as, minority, insanity, or want of freedom; while under the second there would be no real intention of a donation at all, *e.g.*, when a gift is made in jest, or is induced by coercion, fraud, mistake or misrepresentation. So in all these cases the transaction is void of any legal effect. This rule is not limited to gifts alone, but to all other transactions, as Manu (VIII, 168) says that 'a gift induced by force, possession taken by force, and document obtained by force, in short everything brought about by force should be regarded as null and void.'

बलाद्वत् बलाद्भुक्तं बलाद् यच्चापिलेखितं ।
 सर्वान् बलकृतानर्थानकृतान् मनुस्मवीत् ॥

A gift made by a person suffering from disease is generally treated as invalid, as the person cannot be expected to judge the propriety of his act, being in an unfit state of mind; but Katyayana (cited in Mitakshara) has given an exception in the case of a pious gift, "What a man has given or promised for a pious purpose, whether in health or in sickness, must be given; and if he has died without giving it, his son shall doubtless be compelled to deliver it."

Voluntary promise of gift enforceable in Hindu Law.

स्वस्थेनार्त्तेन वा दत्तं श्रावितं धर्मकारणात् ।
 अदत्त्वा तु मृते दाप्यस्तत्सुतो नात्र संशयः ॥

It shows that not only the gift made for pious purposes, but even a promise made for such purposes is enforceable against the promisor, if he is alive, and against his son, if he be dead. The obligation cast upon the son has been treated to contain the germ of a testamentary bequest, and on the basis of this text M. Gibelin observed that the Hindu Law of will was of indigenous growth and not an English invention. This obligation is merely moral with respect

to sons, but legal as regards the king. A voluntary promise cannot be generally enforced, though a voluntary act when completed is irrevocable as remarked by Mayne, but it is not true as regards Hindu Law where a promise made with a view to help the promisee in the performance of some religious or pious act which he has already begun is binding and enforceable as a debt due by the promisor. Harita (cited in Vir. on Dattapradanika) has declared, "whatever has been promised in words, but not performed in deed with a view to help the promisee in the performance of some meritorious act is a debt both in this world and in the next."

वाचैव यत्प्रतिज्ञातं कर्मणा नोपपादितम् ।

ऋणन्तद्धर्मसंयुक्तमिह लोके परत्र च ॥

Katyayana (cited in V Mayukha on Dattapradanika) also says that "whoever having voluntarily promised a gift to a Brahmana for religious merit afterwards refuses to give, shall be made to carry out his promise, as if it were a debt, and shall also be liable to punishment."

स्वेच्छया यः प्रतिश्रुत्य ब्राह्मणाय प्रतिग्रहं ।

न दद्याद्गणवहाप्यः प्राप्नुयात् पूर्वसाहसम् ॥

It is, therefore, evident that a voluntary promise to a Brahmana for religious merit or with a view to help the performance of some meritorious act is enforceable in Hindu Law. Mayne says that 'it is quite certain that no promise to confer a future benefit upon a priest, however holy, would be enforced by the secular courts' In that case the courts would be merely giving effect to a doctrine of the English courts of equity under a wrong supposition and treating it as a principle common to all systems of law. This enforcement is true in case of a particular sort of gifts, as explained above, but not for all promises. Gautama says: "gift though promised to, should not be made to an unrighteous man."

प्रतिश्रुत्याप्यधर्मसंयुक्ताय न दद्यात् ।

The Hindu Law has, therefore, rightly made the legal rule conform to the moral in recognising certain exceptions to the general rule that 'a voluntary promise can never be enforced.' It may be noted that a mere promise does not confer any title upon the promisee without any actual gift, and the obligation in such cases is likened to a debt, the promisee having merely a personal right against the promisor.

The legal effects of a gift are as under :—

(i) The ownership passes to the donee and the donor ceases to

The legal effects of gifts. have any interest, right or title in the property gifted.

(ii) When once a proposal is made and acceptance given, the donor could be sued by the donee as for a debt.

(iii) It becomes irrevocable. As Manu observes :—

सकृदाहुर्वदानीति भीष्येतानि सता सकृत् ।

With a view to determine these conditions, let us first consider the definition of a gift.

Conditions essential to the validity of a gift. Gift consists in the relinquishment without consideration of one's own right in property and the creation of the right of another, and the execution of another man's right is completed on that other's acceptance of the gift, but not otherwise.

The essential conditions of a gift may thus be summarised as follows :—

- (1) donor,
- (2) donee,
- (3) voluntary,
- (4) without consideration,
- (5) acceptance, and
- (6) delivery of possession.

(1. 2) : The law of gifts, rather resumption of gifts was necessarily a transaction between two living persons. Therefore, according to Hindu Law gifts cannot be made in favour of a person who was not in existence on the date of gift. This was what their Lordships of the Privy Council laid down in *Tagore v. Tagore* (18 W. R. 359). But this rule of pure Hindu Law has been modified by the Hindu Disposition of Property Act, wherein it is provided that no gift by a Hindu of any property shall be void by reason only that the donee was not in existence on the date of gift.

(3. 4) : The gift must be voluntary and without consideration. The sages lay down that gifts made by a minor, an idiot, a lunatic, *etc.*, are invalid.

As Narada observes :

बालमूढास्वतन्त्रार्तमत्तोऽपवर्जितम् ।

(5. 6) : The definition of gift given by the Mitakshara and quoted above would prove beyond doubt that a gift is required to be accepted by the donee. Therefore, acceptance of the gift is one of the necessary conditions.

Reference may here be made to another stray passage in Ch. III, 5. 6 of the Mitakshara :—“The creation of another man's right is completed

on the other's acceptance which is made by three means, mental, verbal or corporeal. In the case of land as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some such possession otherwise the gift or sale or other transfer is not completed. The Bombay High Court in *Abaji Gangadhar v. Mahta* (18 Bom. 688) and *Gordhan Das v. Bai Ramcoover* (26 Bom. 449) held that a gift under Hindu Law is not valid unless it is accompanied by delivery of possession of the gift from donor to the donee. But it seems that the attention of the Judges of the aforesaid High Court was perhaps not drawn to a passage from the Mitakshara which has laid down clearly that "not that possession is essential to the validity of a gift, but that in the absence of other evidence, it is the best evidence in determining conflicting claims."

Although the Hindu Law requires delivery of possession to complete a gift of immovable property, the law has been abrogated by sec. 123 of the T. P. Act. This section clearly seems to have the effect of rendering unnecessary the delivery of possession substituting as it does registration for delivery of possession (a).

Persons incapacitated from making gifts.

(I) No coparcener, not even a father, can dispose of by gift his undivided coparcenary interest, under the Mitakshara :

ये जाता येऽप्यजाताश्च ये च गर्भेष्ववस्थिताः ।

वृत्तिं च तेऽभिकान्तयन्ति न पानं न च विक्रयः ॥

But under the Dayabhaga, a father or even a coparcener is not incapacitated from making a gift.

(II) A Hindu female taking a widow's estate or limited estate cannot make a gift of the property.

अपुत्रा शमनं भर्तुः पालयन्ती व्रते स्थिता ।

भुञ्जीतामरणाद् दान्ता यायादा अर्धमाप्नुयुः ॥

Under pure Hindu Law the following persons have been incapacitated from making gifts on account of personal disability :—

(1) Minor.

(2) Idiot.

(3) Insane.

(4) An intoxicated person.

(5) A person under the influence of (a) fear, (b) anger, (c) hatred and, (d) sorrow or pain.

Doctrine of subtraction of gifts.

This is called **दत्तप्रदानिकम्** which is translated as resumption or subtraction of gift. It occurs when a man having unduly given a thing desires to take

(a) *Kafr Das v. Kanhayalal* 11 Cal, 121, 11 I A 278.

it back. As Narada observes :

दत्त्वा द्रव्यमसम्यग् यः पुनरादातुमिच्छति ।

दत्तप्रदानिकं नाम व्यवहारं पवं हि तत् ॥

असम्यक् is an adverb and means 'in a prohibited mode.'

SECTION 3. SALE

The same principles, *viz.*, full dominion over the property in question, full legal capacity to enter into the transaction, and the reality of the transaction itself, (*i.e.*, not having been brought about by fraud or coercion or the like) which have been discussed in connection with gifts, apply to sales as well.

Under Hindu Law, a person who is not the owner of a property cannot confer any title upon his vendee although the latter might have a *bona fide* belief about the real title of his vendor. The Mitakshara has thus explained the procedure in such cases : 'The claimant will have to establish his title to the thing in the first instance and to explain how it got out of his possession. On his succeeding to prove a subsisting title, the purchaser will be called upon to produce his vendor ; the contest will then go on between him and the claimant ; in case the claimant succeeds in proving his title, he will get back the property, and the purchaser his price from his vendor ; and the vendor some punishment from the king ; in the converse case the claimant will be punished for bringing a false action. If the vendor is not produced by the purchaser, he will not only lose the property but will also have to prove his *bona fides* to exculpate himself.' There are certain exceptions to this rule and Katyayana (cited in Viṃśatirodaya on Aswamibikraya) has observed, "if the vendee proves that he purchased the property from the market overt or to the knowledge of the king's officers, or openly from a place where the vendor cannot be traced, or the vendor be dead, then, the claimant, although he is the real owner, shall get back the property on payment of half its price to the purchaser

वणिग्बीथोपरितं विज्ञातं राजपुरुषैः ।

अविज्ञाताभ्रुयात् क्रीतं विक्रेता यत्र वा मृतः ॥

स्वामिदत्तार्द्धमूल्यं तु प्रगृहीयात् स्वकं धनम् ।

: This exceptional rule is justified on the ground that both parties are equally to blame. But in cases where the vendee fails to prove his *bona fides*, *e.g.*, where he purchased in secret, without publicity, from a vendor of doubtful character, at an inadequate price, or at an improper time, he will be punished like a thief. It is the owner's duty to bring the thief to the king, and if he remained satisfied on merely

getting back the property without bringing the matter to the notice of the king, he would render himself liable to be punished with a fine (Yajnavalkya II, 172) :

हृतं प्रणष्टं यो ब्रूयं परहस्तादवाप्नुयात् ।

अनिवेद्य नृपे दण्ड्यः स तु बणवति पणान् ॥

This is a rule which is based on the interest of the community as a whole. Thus the rules as to sales are well thought of, reasonable and equitable

In cases when the purchaser had not previously examined the things purchased with a view to ascertain their quality, or to approve of them upon such examination, he could rescind the contract of sale it within the prescribed period some defect was discovered in the thing purchased. The period allowed for examination was determined according to the nature of the thing sold; thus three days were allowed for the examination of a milch-cow, five days for that of a horse, and seven days for that of precious stones, such as pearls, diamonds and the like. If, however, the purchaser had before the purchase examined the thing to be purchased, and approved of it, then he could not afterwards complain and have the sale rescinded on the ground that there was a defect which had escaped his examination. [Narada IX, 4] :

क्रेता पर्ययं परीक्षेत प्राक्स्वयं गुणदीपितः ।

परीक्षाभिमतं क्रीतं विक्रेतुर्न भवेत् पुनः ॥

Apart from any examination or discovery of defects, the purchaser was further allowed a period of grace within which to return the thing purchased, a sort of *locus penitentiae*, if he repented of the bargain and desired to have the sale rescinded; the period allowed was very short being the first day to get back the full purchase money. The second day the vendor could deduct one-third of the price received and the third day half of it, but the vendee could not recover anything after that. [Narada IX, 2, 3].

क्रीत्वामूल्येन यः परायं दुष्कृतं मन्यते क्रीयी ।

विक्रेतुः प्रतिदेय तत्तस्मिन्नेवान्धविज्ञतम् ।

द्वितीयेऽह्नि ददत्क्रेता मूल्यात् त्रिंशंशमाहरेत् ।

तृतीयेऽह्नि परतः क्रेतुरेव तत् ॥ [Narada IX. 2, 3.]

But this right or privilege could not be availed of if the thing sold had been soiled or otherwise injured by use, although it might subsequently appear to have been defective.

परिभूतस्तु यद्वातः क्लिष्टरूपं मलीमसं ।

सदप्येवमपि तत्क्रीतं विक्रेतुर्न भवेत् पुनः ॥ [Narada IX. 7.]

It is, therefore, evident that these rules were quite reasonable, and, commercialism was not the sole guiding principle of the community.

The sale was completed on the payment of the price, unless the payment was deferred by a special agreement between the parties; the result, therefore, was that where the price had not been paid, the vendor was free to sell to another in the absence of a special contract to the contrary.

Completion of sale.

वस्तुस्य पर्यस्य विधिरेव प्रकीर्तितः ।

अदत्तेऽप्यत्र समयान्नविक्रेतरतिक्रमः ॥ [Narada VIII, 10].

On failure to deliver the thing sold when the sale had been completed, the seller was compelled to do it together with proper penalty. In case of any loss or deterioration of the thing sold, after its demand by the purchaser, even if it arose from an act of king or an act of God, over which the seller had no control, the liability fell upon him, for the non-delivery was due to his default. (Yajnavalkya II 256):

राजदौषघातेन पर्ये दोषमुपागते ।

हानिर्विक्रेतुरेवासी याचितस्याप्रयच्छतः ॥

In the contrary case if delivery was not taken by the purchaser, although the seller expressed his readiness to deliver, then any loss arising from an act of king or an act of God was suffered by the purchaser, for it was he who defaulted in taking the delivery. [Narada VIII, 9]:

दीयमानं न गृह्णाति क्रीतस्पर्यञ्च यः कथी ।

स एवास्य भवेद्दोषो विक्रेतुर्योऽप्रयच्छतः ॥

This rule would not apply if the loss occurred owing to some wilful act of the seller. A doubt arose in a case when there was no demand by the purchaser nor any offer to deliver on the part of the seller Viramitrodaya after referring to Yajnavalkya's text, as given above, and without disapproving the law laid above, gives the opinion of Smriti Chandrika to the effect that where after the completion of purchase, neither the purchaser makes any demand for delivery nor the seller offers to deliver the thing sold, and it is lost or injured, the loss will be equally divided between the seller and the purchaser, in as much as owing to the negligence of the one to offer and of the other to demand delivery, there has been default on either side (Smritichandrika):

क्रयानन्तरं क्रेत्रा न याचितं, विक्रेत्रा च न समर्पितं ।

जातद्वीराद्युपद्रवस्तत्र, द्वयोः समा हानिः ।

क्रेतुविक्रेत्रोदमयोरपि याचनानर्पणशैथिल्येन सार्पराधत्वात् ।

In the absence of a special contract, the owner was not precluded from dealing with some other intending purchaser. But when earnest money had been paid by the purchaser, the case was quite different. If the would-be purchaser refused to complete the intended purchase within proper time, he forfeited the earnest money, but if the seller refused to complete the sale, he had to return not only the earnest money, but also to pay an equal sum as compensation.

सत्यङ्कारञ्च यो दत्वा यथा कालं न दृश्यते ।

पर्यम्भवेन्निसृष्टं तद्दीयमानमगृह्णतः । [Vyasa]

सत्यङ्कारकृतं द्रव्यं द्विगुणं प्रतिदापयेत् [Vaj II, 6a.]

अत्र पर्यद्रव्यस्योत्सर्गः सत्यङ्कारद्रव्यस्योत्सर्गेऽभिमतः । [Vramitrodaya].

The same rule has been laid down by Justinian that 'if earnest has been given, then, whether the contract was written or unwritten, the purchaser, if he refuses to fulfil it, loses what he has given as earnest, and the seller, if he refuses, has to restore double.'

It is noteworthy that the provisions of Roman Law, *vis.*, completion of sale on payment of the price to the seller and effect of payment of earnest money as given above, have a close resemblance to those of the Hindu Law on the subject.

Hindu and Roman Law compared.

SECTION 4. PRESCRIPTION AND LIMITATION

The general law of prescription is that the legitimate owner forfeits his right of property if it is occupied by another and, though present, does not raise any claim within 10 years. (Ga. XII. 37; Vashistha XVI. 12, Narada III. 4) As Manu (VIII. 147) observes:

या किञ्चिद् दशवर्षाणि सन्निधौ प्रेप्सते धनी ।

भुज्यमानं परैस्तूर्णानि न स तद् लब्धुमर्हति ॥

yet this principle was regarded as dangerous and attempts were made to checkmate its effects by ordaining as many exceptions in respect to it as possible According to Vrihaspati (IX. 15) and Narada (XIII. 48) uninterrupted possession of the property in dispute is essential for prescription.

Apart from the question as to how far prescription was held applicable to immovable property in the days of Gautama we meet with later authors who often speak of possession of this kind of property.

पश्यतो ऽ मुवतो भूमेर्हानि विंशतिवार्षिकी ॥

परेण भुज्यमाना या धनस्य दशवार्षिकी ॥

According to Yajnavalkya (II 24) its possession should extend over twenty years, *i.e.*, double the period as ordained for the movable; the difference is evidently due to the greater value attached to land. Later Smritis advocated longer periods for prescription; Vrihaspati (IX. 7) laid down 30 years, Katyayana (VIII. 6) going as far as 60 years.

Exceptions to the rule of prescription.

As to the exceptions to the applicability of the rule of prescription, they are summed up in the text of Yajnavalkya :—

आधिसीमीय निक्षेपजडवालधनैर्विना ।

तथोपनिधि राजस्वैःश्रोत्रियानां धनैरपि ॥

He lays down that the rule applies except in the cases of (1) *pledges*, (2) *boundaries*, (3) *trust deposits*, (4) the *wealth of idiots and infants*, (5) *sealed deposits* and (6) the *property of the king*, (7) a *woman* or (8) a *person versed in the Vedas*. Besides these exceptions, it was also laid down that there would be no prescription when possession was permissive, being allowed for affection for a kindred or the like, सम्प्रीत्या भुज्यमानानि न नश्यन्ति कदाचन the reason being that in a case like this possession cannot be regarded as adverse. ,

Manu (VIII. 146) has declared, "In the case of things used with friendly assent, they do not become lost by mere adverse possession."

सम्प्रीत्या भुज्यमानानि न नश्यन्ति कदाचन ॥

'If the owner is neither an idiot, nor a minor, and his property is enjoyed by another before his eyes, it becomes lost to him by law, and the adverse possessor shall retain that property.' [Manu VIII. 148]

अजडश्चेदपोगण्डो विषये चास्य भुज्यते ।

भगन्तद् व्यवहारेण भोक्ता तद्धनमर्हति ॥

'But a pledge, boundary, and property of a learned Brahmana (a) are not lost through adverse possession.' [Manu VIII. 149].

आधिः सीमा वालधनं निक्षेपोपनिधिः स्त्रियः ।

राजस्वं श्रोत्रियस्वं च न भोगेन प्रणश्यति ॥

The reasons for these exceptions are sound as there is justification for the real owner in not asserting his right, as in the case of deposit, the owner has no reason to object to it, and in the case of idiots or minors, they are unable to assert their rights. So is the case with women owing to their modesty and ignorance of their rights, or in the case of the king who is too busy with the business of the State, or the Vedic scholar (a) or heretics who are busy in their own serious works.

These principles are not peculiar to the Hindu system, but are also found in other systems of jurisprudence.

The plain meaning of the text of Yajñavalkya (II, 24) bearing upon the question of prescription seems to be that
Law of prescription. he who sees his land being enjoyed by a stranger for *twenty years*, and his personal chattel for *ten years* without asserting his own right, loses them.

पश्यतो ऽ भुवतो हानिर्भूमो विंशति वार्षिकी ।

परेण भुज्यमाना या धनस्य दशवार्षिकी ॥ [Yaj. II 24.]

Thus in order that long possession may have the effect of destroying one's title **हानि** the property or article must have been held by the stranger to the knowledge of the owner, and without any protest or opposition from him **अभुवतः** ।

The presence of the knowledge **पश्यतः** with the absence of opposition on the part of the owner has the effect of extinguishing his right and when either of these elements are wanting, the resulting consequence will not arise. It, therefore, follows that whatever the length of possession of the stranger, it will be of no avail if the owner was not aware of it, or being aware asserted his title and opposed the possession of the stranger.

These are the essential elements in the constitution of the right. It is also clear that the effect spoken of is *extinctive* in its character as indicated by the word **हानि** which means loss or deprivation; words used in the texts of other law-givers are also of similar importance. Hence we can say that by adverse possession of the requisite character the owner loses or is deprived of something. But then a remarkable controversy full of subtle distinctions clustering round the question, arises as to what that something is.

The Mitakshara (p 325) places a very narrow construction upon the text cited above, and the effect of prescription according to it is very limited in its character. It argues that omission to assert one's title cannot legitimately be regarded as a cause of the extinction of that title; similarly, mere enjoyment, whatever its duration, cannot be regarded as a source of title.

It, therefore, concludes that the loss spoken of in the texts means not the loss of the property itself but of the usufruct enjoyed by the person in adverse possession, so that the owner shall not be entitled after the prescribed period to recover the profits already appropriated by the person in possession whom he has allowed to do so with his

eyes open and without any opposition, as title cannot be lost by mere lapse of time in asserting it.

But in cases where the adverse possession has continued without the man's knowledge, he is entitled to the produce also even after 20 years. The adverse-possessor is always liable to be punished like a thief as ordained by Narada (VI. 14): "The king shall punish a person who enjoys another's property without any title as if he were a thief although he may have done so for hundred years."

**अनागमस्तु यो भुंक्ते बह्वन्यशतान्यपि ।
चौरदण्डेन तं पापं दण्डयेत् पृथिवीपतिः ॥**

The construction put by Vishwarupa on the text of Yajnavalkya is that it is not correct to ignore the possession by others of one's property; and when it speaks of 'loss', all that is meant is that he cannot claim it in a court of law. So the king may either confiscate the property or hand it over to the rightful claimant.

On the other hand, the authors of Kalpasutra, Ratnakara, Smrititattva and Smritichandrika maintain that adverse possession for the prescribed period and fulfilment of the required condition does extinguish the title of the owner so kept out of possession, not only to the usufruct but also to the property itself. They argue that there is no sufficient ground to limit the scope of the text by putting an unnatural and strained meaning upon the words in the way indicated above. If it be said that the usufruct is lost because of the owner's own fault in omitting to protest against the possession of the trespasser, the mention of the twenty years prescriptive period becomes infructuous and the natural inference in that case is that the property cannot be lost by mere non-enjoyment which is also not correct. Therefore, they hold that the prescription is extinctive and title also is lost.

Manu (VIII, 147) also says, 'when the owner of the property knows of its being enjoyed by a stranger for ten years, during which time he does not complain of it either to the man himself or to the king, his right over the property ceases.'

(4) Manu.

यत्किञ्चित्द्दश वर्षाणि सन्निधौ प्रेक्षते धनी ।

भुज्यमानं परैस्तृण्यो न स तत्तत्तद्वधुमर्हति ॥

Bhavadewa maintains that adverse possession for the prescribed

(5) Bhavadeva's doctrine of pre-sumption.

period to the knowledge of and without any opposition from the owner, has the effect of raising a presumption that the owner must have abandoned the property and that the possessor acquired the title to it by a sort of appropriation परिग्रह of a thing which is for the time being without an owner. So according to him the extinction of title of the previous owner is not the direct result of adverse possession for the prescribed period suffered by him without opposition but is the result of abandonment which is presumed from adverse possession. The loss of title is according to him a matter of inference. The presumption of abandonment, since it arises from the text quoted above, must be taken to be irrebuttable in its character. Pradipakara also accepts this view, but with a little amendment. Viramitrodaya points out that ten years or twenty years is really not too long a period to be beyond all human recollection and when no body recollects any transfer in favour of the possessor or any abandonment by the previous owner, the inference is that no such thing took place, since otherwise it would have been remembered ; hence the presumptions on which reliance has been sought to be placed by Bhavadeva and the Pradipakara do not really arise and their doctrines cannot be seriously sustained.

Doctrine of extinctive prescription criticised.

The real difficulty in the way of accepting the doctrine of extinctive or translativ prescription arises from the view which seems to have been widely recognised that title cannot be extinguished by mere adverse possession without consent or concurrence of the real owner, hence Vijnaneshavara attempted to explain the text of Yajnavalkya by arguing that loss हानि spoken of there refers to the loss of usufruct already enjoyed, but he does so by putting a somewhat strained interpretation upon the words of the texts. *Vrihaspati* endeavoured to dispose of the question in a somewhat different way ; the text of Yajnavalkya and similar other texts, he contended, were designed to point out the risk of indifference in asserting one's title to a property which is being enjoyed by another, and hence to impress upon the owner the duty of preserving with care the evidence of his title by asserting it in proper time. This view reduces the rule of prescription to a rule of evidence, but the obvious objection to it is that it makes the prescription of definite periods (10 to 20 years) superfluous, since it cannot be said that the risk is any the less before the completion of these periods.

Apararka avoids all these controversies by maintaining that the loss of property as contemplated in these texts has been stated from the stand-point of positive law administered by courts, but it does not

indicate the real direction which the property takes under those circumstances, as is supported by *Manu* who declared that (VIII § 108) "*If a person not being an idiot or a minor allows his property to be enjoyed by another, then his title to it breaks down, the person in enjoyment succeeds in litigation*" Thus the court will not help the owner in getting back the property, from the person in possession, but his title would not be lost, and if the person in possession out of moral scruples returns the property, the title and possession again vest in the same individual, i.e., the real owner. *Apaiṅka* has therefore reduced the rule to a rule of limitation of action but he could not consistently maintain the distinction between a rule of limitation which is meant for the guidance of courts, and a rule of prescription which operates by extinguishing the title itself.

There is a text of *Vrihaspati* which lays down that "When a person has been in possession continuously for 30 years without any interruption, that possession will not afterwards be disturbed."

अभ्यासनात् समारभ्य भुक्तिरस्याविधातिनी ।

त्रिशद्वर्षेरायविच्छिन्ना तस्य तां नविचालयेत् ॥ [Vrihaspati cited in Vir. on Bhukti]

Viramitrodaya reconciles this text with that of Yajnavalkya by holding that the rule of 20 years applies where no assertion of title has been made by the owner, but the 30 years' rule applies where inspite of assertion of title by the owner adverse possession has been continuously maintained. Dr. Sen says,

"As regards the controversy, it would seem that the texts themselves laid down not merely a rule of limitation or a rule of evidence but a rule of extinction of title by operation of law. The text prescribing property by wrongful possession, although that property may have continued for a long time, is not really in conflict with the texts laying down definite periods for extinction of title by prescription, for a man may be punishable for the original trespass even after a long lapse of time apart from any question regarding the civil rights of the parties and the civil remedies of the original owners. When, however, in course of time, the constructive period was followed by the critical period of Hindu jurisprudence, and the philosophical jurists who took up the discussions began to enquire into the theoretical basis of prescription, they were beset with doubts and difficulties and the result was that different jurists tried to solve them in different ways."

A study of modern European jurisprudence reveals a similar controversy and a similar disinclination to regard titles as capable of being totally lost through mere dispossession.

Before Justinian's time, the periods for the operation of *usucaption* were one year in the case of movables and two years in the case of immovables within *solum italicum*, and it was essential that the possession must have begun *bona fide* and *ex justa causa*, i.e., in some recognised method of acquiring property. Under Justinian legislation, *usucaption* was superseded by prescription with the period for its operation considerably lengthened : from one year to three years as regards movables, and from two to ten or twenty years as regards lands according as the adverse possession was held against a person present in the province or absent therefrom. It was very much similar to Hindu Law excepting on these points : (1) the prescriptive period for movables was shorter under the Roman Law than under the Hindu Law ; (2) Hindu Law did not allow any prescription against an absent owner ; (3) When the possession had no *bona fide* beginning the period was thirty years in Roman Law which was known as *prescriptio longissimi temporis* which compares with the rule of thirty years of Hindu Law when not free from verbal protest. So there is striking resemblance in the two systems of jurisprudence on this point.

In the absence of evidence to the contrary, possession is evidence of title. But *title* to a property is *superior* to *possession* for the determining of one's actual right to a property. Possession depends upon title and in fact it is legalised by title. Possession not sanctioned by title is not legal, as explained by the Mitakshara. But according to Apararka, title is an additional proof. Yajñavalkya [II. 27] says, 'Title predominates over possession unless the latter be hereditary.'

Long possession : Relative strength of title and possession.

आगमोऽभ्यधिको भोगादिना पूर्वक्रमागतात् ।

The exception in the case of hereditary possession shows that such possession excludes an enquiry into title. But for the desired effect the possession must have continued through three generations. So Narada [I 91] declares, 'where possession has continued through three generations in the past including the father, it cannot be disturbed even if it was wrongful'.

अन्यायेनापि यदभुक्तं पित्रा पूर्वतनैस्त्रिभिः ।

न तच्छक्यमपाकर्तुं क्रमात्रिपुरागतम् ॥

Vyasa says, "possession extending over one generation means possession for twenty years, so that possession for three generations

means possession for at least sixty years," [cited in Vir. on Bhukti].

वर्षाणि विंशतिर्भुक्ता स्वामिनाव्याहृतास्तती ।

भुक्तिः सा पौरुषीभूमेद्विगुणाच्च द्विपौरुषी ॥

The Mitakshara lays down that for possession which had its beginning within living memory, valid title may be proved or shown, but in case of immemorial possession the origin of title is obscure, so further enquiry may be excluded and this principle has been accepted by Katyayana on the basis of the text of Narada [I. 89] to the effect that when it is impossible to ascertain any one's title, possession descending through three generations must prevail.

स्मार्त्तकाले क्रिया भूमेः सागमा भुक्तिरिष्यते ।

अस्मार्त्तेऽनुगमाभावात् क्रमात् त्रिपुरुषागता ॥

The rule can, therefore, be deduced thus that mere possession does not supersede an enquiry into title, for possession may be with one and title with another, but when possession has descended through three previous ancestors, it may be so excluded and even in this case such long possession if shown to be wrongful, may be disturbed. This presumption is not absolutely irrebuttable. Such assumptions are found in other modern systems as well.

The relevant and important texts on adverse possession and limitation are as under :—

(1) Adverse possession :

पश्यतोऽब्रुवतो भूमिर्हानिर्विंशतिवार्षिकी ।

परेण भुज्यमाना या धनस्य दशवार्षिकी ॥

[Ya]. II. 24.]

अजश्चदेयो गंडो विषमे चास्य भुज्यते ।

भग्नं तद् व्यवहारेण भोक्तो तद्धनमर्हति ॥

अभ्यासनात् समारभ्य भुक्तिर्यस्या विधाहिनी ।

त्रिंशद्वर्षारायविच्छिन्ना तस्य तां न विधातयेत् ॥

[Vrhaspati.]

(2) Limitation :

आधिः प्रणश्येत् द्विगुणे धनी यदि न नोप्यते ।

काले कालकृतो नश्येत् फलभोग्यो न नश्यति ॥

[Ya.]

एतदेव स्पष्टीकृतं बृहस्पतिना— ऋणी बन्धमवाम्पुयात् ।

फलभोग्यं पूर्णकाले दत्त्वा द्रव्यं तु सामकं ॥

यदिप्रकर्षितं तत् स्यात् तदा न धनभारं धनी ।

ऋणी च न लभेत् बन्धं परस्पर मतं विनेति ॥

[Mitak.]

ऋणं लेख्य कृतं देयं पुरुषैस्त्रिभिरेवतु ।

आधिस्तु भुज्यते तावद्यावत्तन्न प्रदीयते ॥

[Ya]. II. 90.]

दर्शनं प्रतिभूयंश्च भूतः प्रात्यापिकोऽपि वा ।

न तत्पुत्रा ऋणं दद्याः दद्याः दीययदः स्थितः ॥

[Pit. II. 54.]

SECTION 5. INHERITANCE AND SUCCESSION

The law regarding acquisition of ownership through kinship or heirship independently of any voluntary act on the part of a person, would now be the subject for our consideration. Succession covers a much wider field of which only a part is affected by inheritance. Inheritance is derived from the Roman *heres*; an heir takes by inheritance, but a successor may take also under a will or other arrangement. The law of Inheritance comprises the rules according to which property, on the civil or natural death of the owner, devolves upon

Definition of the law of Inheritance.

other persons, solely on account of their relationship to the former owner. This title has been treated in

Hindu Law under the heading *Daya vibhaga* which includes not only the law of inheritance but also the rules of division of any estate, in which several persons have vested rights arising out of their relationship to the owner. Civil death of a person results from his entering a religious order, or excommunication. The relations or kinsmen (*Sambandha*), having a right to inherit are of six kinds :—Those having (1) Blood relationship (consanguinity), (2) Relation *by adoption*, to the adoptor (3) connection by marriage, (4) spiritual connection, (5) co-membership of a community or association, and (6) Relationship of a ruler to his subjects.

Their divisions.

These may be considered according to the natural or legal status of the person leaving the property, under the following heads :—

I. REGARDING SUCCESSION TO A MALE :

(1) To a house-holder (*grihastha*), a member of an undivided family (*avibhakta*).

(2) To a temporary student (*upakurvana brahmacharin*), to a separated house-holder (*vibhakta grihastha*), and to a united house-holder in respect of his separate property.

(3) To a re-united coparcener (*Samsrishtin*).

(4) To a professed student (*naishthika brahmachari*) and to an ascetic (*Yati or Sannyasi*).

II. REGARDING SUCCESSION TO FEMALES :

(1) To unmarried females.

(2) To married females having issue.

(3) To childless married females.

III. REGARDING PERSONS EXCLUDED FROM INHERITANCE :

The property which so devolves upon a person is termed *Daya*

Meaning of Daya दायः

दायः। The **Mitakshara** defines it as signifying "the wealth which becomes the property of another, solely by reason of his relationship to the owner."

दायशब्देन यद्वत् स्वामिसम्बन्धादेव निमित्तादन्यस्य स्वं भवति तदुच्यते ।

The word 'solely' **एव** has been used to exclude any other cause, such as a gift or a sale by the owner, and to emphasise the fact that it is the relationship alone which determines the accrual of ownership. But **Dayabhaga** defines *daya* as signifying gift. In the law of Inheritance, however, the term *daya* is by usage employed to signify wealth in which proprietary right dependent on relationship to the former owner, arises on the extinction of his ownership by death, natural or civil, such as degradation, renunciation of worldly objects and retirement to a holy place for religious purpose. The difference in the two definitions of the term *daya* is due to the fact that while according to Mitakshara it is not absolutely necessary that the ownership of a person must cease before his kinsmen may get an interest or ownership in the property, (e.g., paternal male ancestor in the male line.) Dayabhaga holds that cessation of the ownership of a person is a condition precedent to the acquisition of ownership by kinsmen by virtue of the relationship that exists between the two. This, therefore, is the fundamental difference between the two schools. So according to Dayabhaga, ownership to a person's property on account of kinship to that person arises only on his death, however close his relationship to the owner may be; or in other words, the doctrine of the acquisition of ownership upon the demise of the last owner **उपरम स्वत्ववाद** must prevail. But according to the Mitakshara, there are certain relations who, at the moment of their birth, acquire ownership in the property of their kinsmen, i.e., they become co-owners in the property and their ownership does not depend on the cessation of the previous ownership; thus it is their *birth* that determines their co-ownership which has been termed as the doctrine of acquisition of property by birth **जन्मस्वत्ववाद** and is thus contrary to the doctrine of Dayabhaga in this respect.

The Mitakshara doctrine of the acquisition of property by birth is limited to sons and grandsons, but the **The Mitakshara doctrine.** Viramitrodaya includes great-grandsons also in this category. Therefore, according to the two classifications of heirs, the Mitakshara school holds that *daya* is of two kinds, namely, unobstructed **अप्रतिबन्ध** (*a-pratibandha*) and obstructed **सप्रतिबन्ध** (*sapratibandha*)

The Mitakshara (Ch. I. Sec. 1, 3) further elucidates the point thus: "The wealth of the father or the paternal grand-father becomes the property of his sons or grandsons, in right of their being his sons or grandsons; and that is a devolution of property not subject to obstruction. But property devolves upon (parents), or uncles, brothers

and the rest, upon the demise of the owner, if there be no male issue; and thus the actual existence of a son and the survival of the owner, are impediments to succession; and on their extinction the property devolves upon the successor by the right of his being uncle or brother. This is known as inheritance subject to obstruction." This distinction as regards the devolution of property subject to obstruction and otherwise, has not been recognised by the Dayabhaga. In that school, all heritages whether of sons, grandsons, great-grandsons, or brothers, uncles and the rest, are liable to obstruction.

The question arises as to what kinds of the property of the father does the peculiar doctrine of the Mitakshara apply? Mayne (Ed. IX. p. 344) says, "All property which a man inherits from a direct male ancestor, not exceeding three degrees higher than himself, is ancestral property, and is at once held by himself in coparcenary with his own issue. But where he has inherited from a collateral relation, as for instance, from a brother, nephew, cousin, or uncle, it is not ancestral property; consequently his own descendants are not coparceners with him." Similarly, he maintains that the property inherited by a man from a female or through a female, or father's self-acquisition neither belongs to the co-heir (p. 451) nor is ancestral.

It appears that Mayne has not given a correct statement of the Mitakshara law though the inaccuracy may not lead to any difference in the result. This wrong notion is due to the translation of the passage :

तस्मात् पैतृके पैतामहे च द्रव्ये जन्मनैव स्वत्वम् ।

by Colebrooke in these words: 'therefore it is a settled point, that property in the *paternal* or *ancestral* estate is by birth.' The correct view of the Mitakshara seems to be that the right acquired by a son by birth in the property of the father is not limited to any particular kind of property, but extends over all the property of the father, however, acquired.

The Mitakshara concludes after an elaborate discussion on the maintainability of the doctrine that property arises by birth, that therefore (i. e., on the grounds already set forth) it is certain that in the paternal as well as grand-paternal पैतामह estate, property arises by birth.

The separate mention of '*paternal*' and '*grand paternal*' in this passage means that the son acquires his right by birth in all kinds of his father's property whether ancestral or not. This view is further supported when in winding up this discourse the Mitakshara says, 'Although property arises by birth in paternal as well as grand paternal

(ancestral) estate, we shall mention a distinctive peculiarity in dealing with the *text* "land acquired by grand-father, *etc.*" The peculiarity has been further explained to be that the father's right of free alienation is restrained by the *equal co-ownership* of the son ; while in the case of self-acquired property of the father, the son has no right to object to the father's alienation but must acquiesce therein. This point has been cleared by the Mitakshara, "consequently the difference is this : although he has a right by birth in his father's and in grand-father's property ; still, since he is dependent on his father in regard to the paternal estate and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property ; but since, both have indiscriminately a right in the grand-father's estate, the son has a power of interdiction (if the father be dissipating the property)". It can, therefore, be safely said that the right that a son acquires by birth in his father's property is not limited to ancestral property alone, but extends over the entire property of the father, although the extent of the right is not everywhere the same but depends on the nature of the property (x).

As regards self-acquired immovables, the Mitakshara (Ch. I Sec. V, 10) observes "since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property." An earlier passage (Ch. I, Sec. I, 27) states, "Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made."

The former passage indicates that the father can dispose of his self-acquired property, whether it be movable or immovable, in any way he likes and the sons must acquiesce, while the latter lays down a different rule, that the father is subject to the control of his sons in regard to the immovable property, whether acquired by himself or inherited from his father or other predecessor.

The apparent conflict can be solved if the restriction as to the alienation of immovable property by the father be treated as an exception to the general rule regarding the father's acquired property of all kinds. This interpretation has been given by the Viramitrodaya :

"Although the ownership of the sons and grandsons in the property

(x) Dr. Sen's Hindu Jurisprudence p. 131.

of the father and the grandfather arises by birth alone, still by reason of the texts previously stated, the sons being dependent on the father, with respect to the father's self-acquired property, and the father being entitled to superiority on account of his being the acquirer, the sons must give their assent to the disposal by the father of his self-acquired property excepting land and slaves, by reason of the previously cited text, namely—'immovables and bipeds, *etc.*,' (Ch. II, Pt. 1, 17). Another passage—Ch. II, Pt. 1, 22—states that 'of immovable property, whether ancestral or self-acquired, the father may make gift and the like only with the consent of the sons by reason of the text previously cited, *vis.*, —Immovables and bipeds, although acquired by a man himself, shall not be gifted away or sold without the consent of all the sons.' In Rao Balwant Singh v. Rani Kishori (25 I. A. 54, 26 All. 267), their Lordships of the Privy Council held that the passage in which the Mitakshara prohibits the alienation of his self-acquired immovable property by the father without the assent of the sons merely lays down a rule, founded on moral and religious consideration, which carries with it no legal obligation; regarding the apparent conflict in the Mitakshara it was observed that 'all these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws.'

The ground of maintenance of children born and unborn, by the Mitakshara seems to suggest that the precept is directory and not mandatory in its character. So the conclusions of their Lordships of the P. C. quoted above are correct that the precepts in Mitakshara Ch. I, Sec. 1 belong to the former class and of sections 4 and 5 to the latter. This dispute has been finally set at rest by the Mitakshara as well as Viramitrodaya as they lay down in one and the same sentence the dependence of the father in making an alienation of immovable property, whether ancestral or self-acquired: (Mit. Ch. I. Sec. I. 27) **स्थावरे तु स्वाज्जिते पित्रादि प्राप्ते च पुत्रादिपारतन्त्र्यमेव ।** According to the well-known rule of interpretation **सकृदुच्चरितः शब्दः सकृदर्थं गमयति इति।** a word once pronounced can convey only one meaning, so one cannot maintain that it means one thing when the property is ancestral and another when it is self-acquired. Viramitrodaya expressly declares that 'with regard to immovable property, whether self-acquired or inherited from the father or the ancestor, the dependence on the sons, *etc.*, is alike (Viramitrodaya Ch. I. 30). **स्थावरादौ तु स्वाज्जिते पित्रादि परम्पराप्राप्ते च पुत्रादिपारतन्त्र्यं तुल्यमेव ।** These discussions, however, do not preclude the distinction between self-acquired and ancestral immovable property in the hands of the father, and a son can get only the latter partitioned but not the former.

Yajnavalkya (II, 22, cited in Dayabhaga,) has laid down, "The father is master, even of all gems, pearls and corals; but neither the father nor the grand-father is so of the entire immovable property."

Father's power over ancestral movables.

मणिमुक्ताप्रवालानां सर्वस्यैव पिता प्रभुः ।

स्थावरस्य तु सर्वस्य न पिता न पितामह ॥

Colebrooke says that the father's power over ancestral movables is limited by his own discretion and sense of responsibility. The Mitakshara (Ch. I. Sec. 27) also says that although property in the paternal as well as grand-paternal (ancestral) estate arises by birth, still the father has an independent power in the disposal of effects other than immovables for necessary acts of duty, and for purposes prescribed by texts of the Shastras, such as gifts through affection, support of the family, relief from distress, and so forth. It may be taken that the father has no absolute power of disposing of movables at his own discretion, but only for the purposes indicated in the above passage. The *text*, as cited above, does not impose any restriction as regards ancestral movables, and Viramitrodaya (Ch. II, part I, Sec. 17) also unreservedly holds that as regards gems, pearls, *etc.*, though inherited from the grandfather, the father alone has independence by reason of the previously cited text, *viz.*, the father is master of all the gems, pearls, and corals, *etc.* On the contrary Yajnavalkya holds that the ownership of father and son is similar in case of land which was acquired by the grandfather, and in chattels which belonged to him. The commentary of the Mitakshara based on this text is that both the father and the son have equal rights in the grandfather's estate; however, the son's power to dispute the father's claim created a difficulty in adopting the above view. This conflict can be solved if it be held that the father has the power of alienating ancestral movables at his discretion, but if he begins to dissipate them, the son has the right to object on the basis of his *equal ownership*. The explanation of Nilkantha (Ch. V. Sec. 1) that the independence of the father in relation to gems, pearls, and corals, *etc.*, relates only to 'the wearing and other use of ear-rings, *etc.*', but does not extend to gift or other alienation, is opposed to the Mitakshara and does not contain the correct view of law regarding ancestral movables, as expressed by it.

The Dayabhaga brushes all these distinctions aside, holding that the father is the absolute owner of all his property whether ancestral or self-acquired and that the son's ownership accrues only on his death. The texts requiring the concurrence of the son are regarded as only moral

Father's power under Daya-bhaga.

and religious injunctions, so the father, being the absolute owner, can alienate the property in any way he likes; the prohibitory texts do not affect the validity of the transaction. Says Jimutavahana, "So likewise other texts, such as 'Though immovables and bipeds have been acquired by a man himself, a gift or sale of them *should not be made* by him without convening all the sons' must be interpreted in the same manner. Here the words 'should not be made' must be understood to mean 'must be made.' Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one. But the gift or transfer is not null; for a fact cannot be altered by a hundred texts."

Thus under the Mitakshara the son acquires an interest in the property of his father, ancestral or self-acquired, on his birth; as to ancestral property, the interest so acquired is equal to that of the father, it entitles him to call upon the father to effect a partition, and as to immovable property it gives him further right to prevent an alienation by the father without his consent. But under the Dayabhaga, the son has no co-ownership with the father during the latter's lifetime as his ownership arises only upon the cessation of the father's ownership; so a partition cannot be enforced upon the father who is free to give or sell the property without the son's consent (a).

The question, therefore, arises whether the son, under the Dayabhaga, has got any interest in the father's property during the latter's life-time? Referring to the text of Yajnavalkya, "The ownership of father and son is similar in land which was acquired by the father, and in a corrody and in chattels," Jimutavahana explains that chattels must mean slaves, and goes on to say that "the meaning of the text may be as set forth by Dhareswara, 'a father, occupied in giving allotments at his pleasure, has equal ownership with his sons in the paternal grandfather's estate. He is not privileged to make an unequal distribution of it, at his choice, as he is in regard to his own acquired wealth.' So Vishnu says, 'when a father separates his sons from himself, he will regulate the division of his own acquired wealth. But, in the estate inherited from the grandfather, the ownership of father and son is equal.' This is very clear. 'When the father separates his sons himself he may, by his own choice, give them greater or lesser allotments, if the wealth were acquired by himself; but not so, if it were property inherited from the grandfather, because they have an equal right to it.

The father has not in such cases an unlimited discretion." So it is clear that though Jimutavahana repudiates the theory of right accruing by birth, this much interest in the ancestral property has been allowed to the son that the father has no unlimited discretion in distributing the property, if he may so choose to distribute it. Mayne's remarks in this respect are very clear. He says, "In the very chapter in which Jimutavahana lays down that the absolute ownership of the father enables him to deal with his ancestral property as he likes, he also lays down that if he chooses to distribute it, he must do so upon general principles of equity, and cannot even for himself reserve more than a double share. He affirms for one purpose the very ownership by birth which he denies for another." The limits imposed upon the absolute discretion of the father in distributing the ancestral property in any way he likes to the prejudice of the sons go to show that they have vital interest in the ancestral property. Their possession may, therefore, be compared to that of *sui heredes* under the Roman Law and that they are family heirs, and even in the lifetime of their father are considered owners of the inheritance in a certain degree (a).

Under the Mitakshara there is no such thing as succession to property, so called, in an undivided family. The whole body of such a family, consisting of males and females, constitute a sort of corporation; some of the members, who are coparceners are persons entitled to demand a share on partition while others are only entitled to maintenance. When any member dies, his claim ceases and on the birth of any member his interest accrues. So deaths may enlarge the beneficial interest of the survivors, by the diminution of the claimants of the common joint fund or property just as births may diminish their interest by increasing their number. Any member cannot demarcate his interest or allocate to himself any definite portion in the joint estate as births and deaths supervene. But under the Dayabhaga, the position of a deceased owner as the member of a joint family does not make any difference whatsoever for the purposes of succession to the property left by him as a part of the joint family property; the person entitled to succeed, will be determined in the usual way, and it would create no difference whether he was a member of an undivided joint family or had separated from his coparceners before his death. This great distinction between the two leading schools is clear from the comparison of their definitions of partition or severance of co-ownership विभागा । The **Dayabhaga** defines it thus, "Partition consists in particularising by the casting

Devolution of property on the death of a member of a joint family.

Vibhaga defined.

Dayabhaga defines it thus, "Partition consists in particularising by the casting

(a) Institutes Lib. II, Tit. XIX, 2.

of lots or otherwise, a property which had arisen in lands or chattels, but which extended only to a portion of them, and which was previously unascertained, being unfit for exclusive appropriation, because no evidence of any ground of discrimination existed. Or, partition is a special ascertainment of property, or making of it known (as inhering in a particular share with reference to a particular person)." [Dayabhaga Ch. I. Secs 8 and 9, as in Colebrooke].

एकदेशोपात्तस्यैव भूहिणयादावुत्पन्नस्य स्वत्वस्य
विनिगमनाप्रमाणाभावेन वैशेषिकव्यवहारात्तद्वर्ततया
अव्यवस्थितस्य गुटिकापातादिना व्यञ्जनं विभागः
विशेषेण भजनं स्वत्वज्ञापनं वा विभागः । (पुरुषविशेष
निरूपितांशाविशेषनिष्ठत्वेन इत्यर्थः इति श्रीकृष्णः)

But **Mitakshara** defines the term in a different way: Partition (or severance of co-ownership) is the adjustment of diverse rights regarding the whole, by distributing them or particular portions of the aggregate." [Ch. I. Secs. 1, 4.]

विभागोनाम द्रव्यसमुदायविषयानामनेकस्वाम्यानां
तदेकदेशेषु द्रव्यस्य व्यवस्थापनम् ।

Dr. P. N. Sen (p. 145-46) has very nicely explained the difference in these words: "The difference between the two views, therefore, consists in this: according to the Dayabhaga, each of the undivided coparceners has ownership, not over the entire joint property, but only over particular portions thereof which becomes manifest when upon partition these several portions are specifically allotted to the several co-parceners, so that at no time does the ownership of one among several coparceners extend over the whole of the joint property but it always extends over a part, unascertained and undefined before partition, and ascertained and particularised after it. This doctrine is, therefore, known as **प्रादेशिकस्वत्ववाद** or the doctrine of ownership in a part. According to the Mitakshara, on the other hand, the ownership of each coparcener in an undivided family extends over the whole of the joint property, and each part thereof, although to borrow the words of Lord Westbury in Appovier's case, 'no individual member of that family, while it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share' (x). The result is that each co-owner is deemed to be the owner of the whole, in the same manner as other co-owners are also the owners of the whole, the ownership of the

(x) *Appovier v. Ram Subba Aiyar* 11 M. I. A. 89.

one without excluding the co-ownership of the others. This view is known as **समुदायिकस्वत्ववाद** or the doctrine of ownership in the whole".

The principle of right arising by birth applies to the Mitakshara joint-family. Joint family as understood by that **Theory of birth जन्मस्वत्ववाद** school is found *on the law of property* which exists in the son and father, being coparceners in ancestral estate. The idea underlying that law is that if there is any property inherited by the father from his forefathers, his son obtains therein a vested right as soon as he is born. This is the notion which has served as the germ of that complicated principle of law found in the Mitakshara.

In Bengal, however, a different stand was taken from very early days against the co-ordinate rights of a son. The honour of inaugurating this departure from the prevailing law which allows unrestricted transfer of landed property belongs to Jimutavahana. He establishes the unrestricted right of the father to do what he likes with the ancestral property. In Ch. II, 27, Jimutavahana says that there are ancient texts prohibiting the father from alienating the property, yet these texts are to be construed as implying a moral injunction alone.

Let us first consider the texts on which Vijnaneshwara inculcates the right of the father and the son and then we shall see how by natural consequence the idea has given rise to the legal doctrine that every member of a family has a right to each item of its property by birth. Gautama says, "from the very moment of birth one obtains the ownership of the wealth, thus say the authorities.

तथोत्पत्यैव सर्वस्य स्वामित्वं लभन्तस्त्वान्वाय्याः इति (गौतमवचनम्) Of the immovable property and slaves although acquired by one's own self there is neither gift nor sale without assembling all the sons. Those who are unborn and those who are lying in the womb, require subsistence." Let us also note the text which is favourable to Jimutavahana. "The father being dead the sons should divide the wealth—since there cannot be ownership in them while the father is living." (Devala)

These texts are the bones of contention between the respective followers of Vijnaneshwara and Jimutavahana. There is a significant passage in Mitakshara (Para 23. Sec 1 Ch. 1) to that effect. In that it is said that as the subject of ownership is a temporal matter, in other words, is determined by reference to customs and usages observed by the people at large, so also the same popular usage sanctions the principle that the son has a right by birth. From this passage it is

abundantly clear that the chief authority relied upon by Vijnaneshwara for his position that every member of a joint family has a right to each item of its property by birth is popular usage, and he looks to the text of Gautama and subordinates the rest of the texts to that opinion. Jimutavahana, on the other hand, adopted Devala as his guide and construed all other texts in conformity thereto.

The difference between the conceptions of co-ownership has led the author of the Dayabhaga to lay down that a person acquires ownership in another man's property on the latter's death to which he had no right in his lifetime ; whereas the Mitakshara formulated the theory that the principle of survivorship applies to property, to the whole of which the survivor has a right from before, and the death of a coparcener simply removes a person having a similar right to the whole, and so the pre existing right of the survivor is augmented, but it does not create any new right in him. In other words, a Dayabhaga coparcener holds the property in quasi-severalty, as if he were a tenant-in-common, whereas a Mitakshara coparcener holds the entire property, and every part of it, as if he were a joint tenant. The doctrine of survivorship is, therefore, bound up with the peculiar conception of co-ownership as advanced by the Mitakshara. One has to admit that there is a very close affinity between the Mitakshara conception of co-ownership and the doctrine of survivorship as well as between Dayabhaga conceptions of co-ownership and the devolution of property by succession. The reasons are that Raghunandana, the author of Dayatattwa, and the supporter of the Dayabhaga doctrines, and Nilkantha, the author of Vyavahara Mayukha, and a follower of the Mitakshara school, do not depart from the course of devolution, yet they differ from their masters as to the conception of the interest of a co-parcener in an undivided family. Raghunandana criticising the definition of 'partition' in Dayabhaga says that 'the definition is not accurate for how may it be certainly known, since no text declares it, that the lot for each person falls precisely on the article which was already his ?'—and gives his own definition of partition as 'a distributive adjustment, by lot or otherwise, of the property of relatives vested in them over the whole wealth, in right of the same relation, upon the extinction of the former owner's property' While Nilakantha (Ch. IV, Sec. 1) remarks that the prior undefined ownership of many brothers, *etc.*, is defined (and made known) by partition. According to some, by the extinction of prior joint ownership extending over the whole property, a particular ownership is created in portions of it; but this interpretation of the extinction and creation of particular ownerships is faulty, and it may be said that the particular ownership

which was created in a portion was *only* made known by partition as inhering in a particular thing (May. Ch. IV, Sec. 1). Whatever the subtlety of the arguments, it is evident that the Mitakshara conception of co-ownership in an undivided family paves the way for the doctrine of survivorship while the Dayabhaga view is quite adverse to it.

The logical conclusion from the above is that according to the strict Mitakshara doctrine, an undivided coparcener has no right to alienate any portion of the joint property without the concurrence of others, and such alienation, if made, would be void altogether.

Power of alienation of an undivided coparcener.

In the chapter on the rescission of gifts, the Mitakshara lays down that joint property has been declared unfit to be given in the same way as pledges, trusts, deposits, *etc.*, on the ground that it is not the property of the donor, meaning thereby that the donor has not got absolute dominion over it (Mitakshara on Yajnavalkya II, 175) :

स्व दद्यादित्यनेन चास्वभूतानामन्वाहितयाचितकाधिसाधारणनिक्षेपाणां पञ्चानामप्यदेयत्वं व्यतिरेकतो दर्शितम् ।

In this connection another passage (Ch. 1. Sec. 1, 30) of the Mitakshara may be cited, 'among unseparated kinsmen the consent of all is indispensably requisite, because no one is fully empowered to make an alienation since the estate is common ; but among separated kindred the consent of all tends to the facility of the transaction, by obviating any future doubt whether they be separate or re-united ; it is not required on account of any want of sufficient power in the single owner ; and the transaction is consequently valid even without the consent of the separated kinsmen ' An exception to the restriction on

Exception to this rule.

alienation is laid down on the basis of the text ' even a single individual may conclude a donation, mortgage, or sale of immovable property during a season of distress, for the sake of the family, and specially for pious purposes', which has been explained by Vijñāneshwara to mean that "while the sons and grandsons are minors and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated, even one person who is capable, may conclude a gift, hypothecation, or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." (Mit. Ch. I, Sec. 1, 28 and 29).

British Indian Courts have departed from the strict rule of the Mitakshara as to the invalidity of an alienation of the property, by an undivided coparcener to this extent that they have held that the interest of

Judicial departure from the strict rule of the Mitakshara.

an undivided co-parcener may be seized and sold in execution of a decree obtained against him and the purchaser may get his share partitioned. As regards voluntary alienations, without consideration they seem to be unanimous and support the strict law of the Mitakshara, but in case of alienations for valuable consideration they differ. The **Bombay** and the **Madras** High Courts have held that an alienation for valuable consideration should be held valid to the extent of the share which the alienor would have received on partition so the alienee may sue for partition, and thus obtain possession of the share to which he had become entitled by his purchase. But the *Calcutta* and the *Allahabad* High Courts seem to stick to the strict Mitakshara view by holding such alienations to be invalid, though in some cases in setting aside the alienation the courts have enforced the equities in favour of the vendee in such a manner as to bring about the same result as in the Bombay and the Madras decisions. Their Lordships of the Privy Council have remarked that there can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition (a). In face of the strict injunction of Manu, "that he who gives property declared unfit to be given and he who receives it are both liable to punishment as if they were thieves,"

अदेयं यश्च गृह्णाति यश्चादेयं प्रयच्छति ।

तावुभौ चौरवच्छास्यौ दाप्यौ चोत्तमसाहसम् ॥ [Manu cited in Vira. on Dattapradanika].

a purchaser with the full knowledge of the inalienability of joint property must be condemned, but the courts have held otherwise and lent a helping hand to the diverse influences already at work in undermining the integrity of joint undivided family under the Mitakshara law. While a Dayabhaga coparcener can transfer his own share in the joint property, and such a transfer will be valid even without the concurrence of the co-parceners who cannot legitimately interdict an alienation of what is not their own, he cannot alienate the entire joint property. Jaggannath in his Digest quotes the opinion of Vachaspati Bhattacharyya that if the whole of the joint property be sold by one of the parceners, the sale is not valid so far as the shares of the other parceners are concerned but is valid to the extent of the vendor's own

(a) *Surya Bunsu Koer v. Sheo Persad Singh*, 5 Cal 148, 166; *Lakshman Dada Nath v. Ram Chandra Dada Nath* 5 Bom. 48, 61, 7 I. A. 181.

share, and says that this opinion may be admitted (Colebrooke's Digest Vol. II, p. 58).

Another important distinction between the two leading schools of Hindu Law relates to the position of cognates in the order of succession. In the Mitakshara school all agnates, *i.e.*, relations who trace their connection exclusively through males are entitled to inherit in preference to cognates, *ie.*, relations through females excepting the daughter's son and sister's son. The daughter's son has been shown a special favour and has been given a very high position in the order

Position of cognates. of succession which has not been given by our Dharma-shastras. In Yajnavalkya's text also he has not been enumerated. So Vijnaneshwara is constrained to fall back upon the particle *et* and urges that by the import of this particle *et* 'also' the daughter's son succeeds to the estate on failure of daughters (Ch. II, Sec II 6). Apararka also does not accord him any such position. Mayne (Ed. IX p. 764) suggests that the reason of the position assigned to the daughter's sons "is to be found in the old practice of appointing a daughter to raise up issue for a man who had none. The daughter so appointed was herself considered as equal to a son. Naturally her son was equivalent to a grandson, and as the merits of son and grand-son are equal, her son was ranked as a grandson. Consequently we find him enumerated among the subsidiary sons, and taking a very high rank among them. Later on, the practice of appointment of a daughter to raise up issue for the father became obsolete, but the fact of the nearness of daughter and daughter's son remained, and their natural claim to succession on the ground of mere consanguinity recommended itself for general acceptance." This is a very plausible explanation. A recent statute, *viz.*, Act II of 1929, has given a position to sister's son also in the order of succession. The above are the exceptions to the general principle of the Mitakshara law.

The Dayabhaga school does not recognise any difference between the agnates and the cognates, and the order of succession has been based on the *theory of spiritual benefit*. Thus on this principle the daughter's son as well as other cognates are 'sifted in and out among the agnates, heirs in the female line frequently taking before very near sapindas in the direct male line, on the principle of superior religious efficacy.' (Mayne at p. 689). This is due to the interpretation of these two texts of Manu: 'To three must libations of water be made, to three must offerings of food (*pinda*) be presented, the fourth in descent is the giver, but the fifth has no concern with them: To the nearest sapinda

the inheritance belongs ; after that the distant kinsmen (*sakulya*) shall be the heir, or the Vedic preceptor, or the pupil.' In Paivana Sraddha a person presents funeral cakes not only to his three paternal ancestors, but also to the three maternal ancestors, so these maternal sapindas, although cognates, will succeed in preference to *sakulyas* including agnates beyond three degrees.

On the analogy of the succession of one's own daughter, the father's daughter's son would succeed before the paternal grand-father and the rest and so on Jimutavahana observes that 'on failure of the descendants of the father down to the great-grand son, it must be understood that the succession devolves on the father's daughter's son in like manner as it descends to the owner's daughter's son' and that 'the succession of the grand-father's and great grand-father's lineal descendants including the daughter's son must be understood in a similar manner according to the proximity of the funeral offering. The reason advanced by him is that 'even the son of a daughter delivers him in the next world like the son of a son,' and the daughter's sons of one's father and the rest transport his manes over the abyss by offering oblations in which he may participate.' (Dayabhaga Ch. XI, vi, 9). He further argues that on failure of these persons the property should devolve on the maternal uncle and the rest, as they present oblations to these maternal ancestors of the deceased beginning with his maternal grand-father, which the deceased himself was bound to offer. It is by means of wealth that a person may become giver of oblations (Dayabhaga Ch. XI, vi, 13). He ultimately sums up the discussion by saying that a kinsman whether sprung from the family of the deceased though of different male descent as his own daughter's son or his father's daughter's son, or sprung from a different family as his maternal uncle or the like being allied by a common funeral cake on account of presenting offerings to the three ancestors in the paternal and the maternal family of the deceased owner, is a sapinda ; and the text (To them must libations of water be made, *etc.*) is intended to propound the succession of such kinsmen. The subsequent passage (To the nearest sapinda, *etc.*) must be explained as discriminating them according to their degrees of proximity. But on failure of kin in this degree, the distant kinsman (*Sakulya*) is successor (*c*). Thus Jimutavahana has made in-roads for a number of cognates in the list of successors on the principle of religious efficacy which is the guiding principle of that school. It cannot be said to be the sole guiding principle but the object of its introduction is to interpret and corroborate the specific texts of the Dharma-shastras. Sri Krishna

Tarkalankar points out that a stranger who throws the bones of the deceased into the Ganges, or presents cakes to his departed spirit at the holy shrine of Gaya might, on the ground of superior spiritual benefit, claim his property even in preference to his relations (Sri Krishna on Dayabhaga XI, vi, 33) :

अथैतासां स्मृतीनां न्यायमूलत्वे सत्यपि तद्भोग्यपाठ्यं उदाहरि तस्य गङ्गायामस्थिप्रक्षेप्तुर्गयायां पितृवदातुर्वा उदासीनस्याधिकारापत्तिः ।

This comment on Dayabhaga shows the limited application of the principle. The Mitakshara school, on the other hand, advocates the principle of propinquity that no cognate, excepting a daughter's son, can succeed in preference to an agnate. The principle of religious efficacy has not been even referred to by the Mitakshara excepting that the Viramitrodaya (Ch. XIII, Pt. I, Sec. III) makes use of it in finding a position for the great-grandson among the direct male descendants of the deceased on whom the property devolves before the widow and the rest. This novel interpretation derived from the theory of Jimutavahana made room for a large number of cognates and they were shuffled in among agnates, so that many agnates who under the Mitakshara would have an undoubtedly superior position, are superseded.

The necessity for a general preference of agnates over cognates was keenly felt by the Mitakshara school owing to the following facts: (1) the interest of a deceased coparcener in a joint undivided property does not pass by succession but by survivorship; (2) in the case of a divided family, the close ties created by living under the peculiar organisation of the joint Hindu family system which was chiefly agnatic, and (3) the system of the Dayabhaga practically set aside the distinction between divided and undivided family by maintaining a conception of joint ownership which was much more loose than that of the Mitakshara. The idea that co-owners held their shares in quasi-severalty and had full power of disposition, caused a disruption of the close ties of the old joint family system.

The gradual disruption of the old family system explains the altered course of succession and Brahmanism cannot be said to be its cause. Mayne, however, says "Brahmanism was rampant among the law-writers of Bengal.....It was this influence which completely remodelled the law of inheritance in that province by applying tests of religious efficacy which were of absolutely modern introduction." (a) Owing to the operation of social and economic influences that diverted the natural affection of the people into new channels in

Bengal, the old scheme of succession fell into disuse. The altered direction of feelings required a corresponding alteration in the law which was effected by Jimutavahana by the introduction of a new theory of religious efficacy.

This distinction of agnates and cognates finds a place in other

Roman Law.

Western systems of law also, such as the Roman, where the 118th and 127th Novels of Justinian completely remodelled the laws of intestate succession by abolishing the difference between agnates and cognates and created a new order of succession, *vis.*, that of the descendants, the ascendants and the collaterals.

It is but natural that the question of rights of women to own and inherit the family property would depend upon the structure or constitution of the family to which they belonged. Owing to the constitution of the undivided family of the Aryan type they were recognised as mere dependants on their husbands and fathers. In the presence of male members, no woman could claim to inherit. They were treated as chattels and were without any independent rights, as is evident from the text of Manu (VIII, 416) "Three persons, a wife, a son, and a slave, are declared by law to have no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong." "The father protects a woman in her childhood, the husband during her youth, the son in old age; a woman has no right to independence." [Baudhayana II, 2 § 27, Manu IX, 3]. They have not been mentioned in the list of heirs by Vashistha (Ch. XVII) and Baudhayana [I, S. 11, §§ 1—14, II, 2, 3 §§ 41—46]. The latter expressly holds (on the authority of the Vedas) that they have no right to inherit. At least to this extent his authority has been admitted by the Bengal (Ch. XI, 6—11) and the Benares schools that a female can succeed only by virtue of express texts. It cannot be disputed that in earlier times, the position of women was that of complete dependence and originally they had no rights of succession or inheritance. Viramirodaya and Smṛiti Chandrika also clearly lay down that females are excluded from inheritance unless they are admitted to succession by virtue of special texts. The former says, "As for the text of the Smṛiti, namely,—'Therefore, women are devoid of the senses and incompetent to inherit,' and for the text of Manu based upon it, namely,—'Indeed the rule is that women are always devoid of senses and incompetent to inherit,'—these refer to those women whose right of inheritance has not been expressly declared. Some commentators say that the term 'incompetent to inherit' implies

censure only, by reason of its association with the term 'devoid of the senses.' This argument has no force as the portion—'incompetent to inherit' is prohibitory and not condemnatory (Vira. Ch. III. Pt. 1. Sec. 13). In another passage dealing with succession to Stridhana property Viramitrodaya reiterates the same opinion and says: 'But the daughter-in-law and others (of the same sex) are entitled to food and raiment only; for the nearness as a sapinda is of no force when it is opposed by express texts.'

The conclusion arrived at by the author of Smṛiti Chandrika, Haradatta, and other South Indian as well as by all the oriental commentators such as Jimutavahana, is that those women only are entitled to inherit whose right of succession has been expressly mentioned in such texts as—'the wife and the daughters also *etc.*, but that others are certainly excluded from taking heritage by the texts of the Sruti and of Manu.' (x) Therefore, it is proved that the principle of the exclusion of females from inheritance was recognised on all hands from the very early times.

The few cases in which women could succeed may be due to subsequent concessions made for special reasons in favour of some very near relations, such as, wife, daughter, mother and the like. The same causes which led to the break-up of the family union helped women in getting their rights recognised. Their right for maintenance was to be preserved in tact better by giving them some property on the dissolution of the family. In this way their right as heirs and not merely as sharers originated. The old rule of preferring males over females would limit the right, so as to prevent the property passing absolutely out of the family into the hands of male strangers. Therefore, it was but natural that the females would not be fresh stock of descent or that on their death the heirs of the last male owner would succeed. So it would be profitable to consider how the right of each of these females who were near relations, originated.

The daughter and the mother seem to have got their right to inheritance recognised first of all. A daughter who was often appointed to raise up a son for an owner of property having no male issue, remained in her father's family, so that her son was treated as the owner's son and not the son of his actual father. Manu allows a daughter to inherit, but it is not clear whether this fact applied to such appointed daughters only or to others also. The text assigning such a right of inheritance is followed by three texts relating to appointed daughter only; it (IX, 127 Sec 30) then lays down, "The son of a man is even as himself,

(x) Viramitrodaya (Ch. V. Pt. II, 12), Dr. Sen's Hindu Jurisprudence p 170.

and as the son such is the daughter (thus appointed). How then (if he have no son) can any inherit his property but a daughter who is closely united with his own soul?"

अपुत्रोऽनेन विधिना, सुतां कुर्वीत पुत्रिकाम् ।
यदपत्यं भवेदस्यां तन्मम स्यात्स्वधाकरम् ॥
अन्नात्काम् प्रदास्यामि तुभ्यं कन्यामलङ्कताम् ।
अस्यां यो जायते पुत्रः स मे पुत्रो भवेदिति ॥
यथैवात्मा तथा पुत्रः पुत्रेण दुहिता समा ।
तस्यामात्मनि तिष्ठन्त्यां कथमन्यो धनं हरेत् ॥

The same view was taken by Smṛiti-Chandrika (IX. 2, § 16) and by Visvarupa (§ 24) who clearly say, 'The text of Manu intends the appointed daughter alone.' It is clearly noticeable that Manu (IX. 185, 217) while giving the order of succession in respect of the property of a man who left no male issue, makes no reference to a daughter as an heir. The correct interpretation of the above referred texts would be that they spoke of a daughter who became equivalent to a son by virtue of special appointment. The word used by Manu (IX. 130) is 'duhita' (daughter) and not *putreka* (appointed daughter) and he has already dealt with the appointed daughter in the previous texts (IX. 127 and 128). So the last text or subsequent texts cannot refer to an appointed daughter only. Vṛhaspati (XXV. 56) who closely follows Manu also understood it to refer to an unappointed daughter and says, "A daughter, like a son, springs from each member of man; how then should any other mortal inherit the father's property while she lives." Nārada (XIII. 50) also placed her in that position after the son on the ground that she continues the lineage. This is true of an appointed daughter only but her son would be of a different family and of a different lineage like any other *bandhu*. When this practice of an appointed daughter became obsolete, the position of a daughter not so appointed was retained, which position had become familiar by usage; and her right was then recognised on the ground of consanguinity which is evident from the text of the Mitakshara (II. 2, § 2): "As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth."

Distinction between daughters unmarried, married, poor or rich.

In ancient days there was no distinction or precedence between daughters, unmarried or married, improvident or rich as to their right of inheritance, on any religious principle. Devala (3 Dig. 491) says, "To unmarried daughters a nuptial portion must be given out of the estate of the father; and his own daughter,

lawfully begotten, shall take, like a son, the estate of him who leaves no male issue." Yajnavalkya (II. 135) and the Mitakshara (II. 1 § 2) are also of the same opinion. Katyayana says: "Let the widow succeed to her husband's wealth, and in default of her the daughter inherits, if unmarried or unprovided." Parasara (3 Dig. 490) has explained thus: "The unmarried daughter shall take the inheritance of the deceased, who left no male issue, and on failure of her the married daughter." There is thus no idea of religious merit and the object of dowry is to facilitate her marriage and to benefit her. So far as the question of inheritance between married daughters is concerned it is but natural that poor daughters should be preferred to rich ones as explained by Mitakshara (II. 2, 4), Smṛiti-Chandrika (XI. 2, 21), Vyavahara Mayukha (IV. 8) and Viramitrodaya (p. 181). The Benares school recognised the daughter's rights on the principle of consanguinity. The Bengal school which advanced the theory of religious efficacy advocated her rights on the ground that though she offered no religious oblations herself, she produced sons who could offer oblations (*Ganga v. Shumbhoo Nath* 22 Suth. 393; Jagannatha 3 Dig. 194). A reference to Manu Smṛiti (IX. 131—140) would show that the offer of funeral oblations by the daughter's son was considered to be equal to that of a son's son. The Dayabhaga school laid down (IX. 2, §§ 1-3; *Srinati Pramila Devi v. Chandra Shekheb Chatterji* 43 All. 450) that no daughter could inherit unless she was capable of producing a son and thus the daughters who were widows or barren or could produce only female issues were excluded. Smṛiti-Chandrika also excludes barren daughters on the same principle (IX. 2, § 10, 21), but its authority has not been accepted in Southern India. The Madras High Court declined to follow Smṛiti-Chandrika on this point (d). MacNaughten (at p. 22) gives the order of precedence in the matter of the succession and inheritance of daughters in the different provinces thus: "According to the doctrine of the Bengal school, the unmarried daughter is first entitled to the succession; if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male issue are together entitled to the succession, and on failure of either of them, the other takes the heritage. In no circumstances can the daughters who are either barren, or widows, destitute of male issue, or the mothers of daughters only, inherit the property. But there is a difference in the law as it obtains in Benares, on this point, that school holding that a maiden is in the first instance entitled to the property; failing her, the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that in default of indigent

(d) *Summani v. Muttammai* 3 Mad. 265.

daughters, the wealthy daughters are competent to inherit ; but no preference is given to a daughter who has, or is likely to have male issue, over a daughter who is barren or a childless widow. According to the law of Mithila, an unmarried daughter is preferred to one who is married, failing her, married daughters are entitled to the inheritance. But there is no distinction made among the married daughters ; and one who is married, and has, or is likely to have male issue, is not preferred to one who is widowed or is barren. Nor is there any distinction made between indigence and wealth." The same view has been advanced by the Mitakshara school and accepted by High Courts and the Privy Council (b). The Bombay High Court has also held that a prostitute is not an unmarried daughter within the meaning of these texts (c).

The right of the daughter as an heir was, therefore, recognised from the earliest times, at first of an appointed daughter and later it was extended to all daughters, whether appointed or not. The Mitakshara (II. ii, 2), citing the texts of Katyayana and Vrihaspati declares that "the daughters inherit in the absence of the wife." Apararka holds that "in the case of daughters, ownership in the father's wealth arises by birth itself as in the case of sons." The Smṛiti-Chandrika (XI. ii, 7-19, 21), the Viramitrodaya (III. ii, 5, Settler's II. 406-412), the Vivada-Chintamani (p. 292) and Vijnaneshwara (II, 2,5) interpret the text of Manu as referring to the unappointed daughter and reject the contrary view of other commentators.

Baudhayana, Apastamba, Gautama and Vashista do not mention the mother in the list of heirs ; Narada (XIII. 12) also does not assign her any position in the list of heirs but recognises her right to a share at the time of partition among the sons on their father's death. Manu (IX. 217) says, "of a son dying childless (and leaving no widow) the (father and) mother shall take the estate : and the mother also being dead, the paternal (grand-father and) grand-mother shall take the heritage (on failure of brothers and nephews.)"

Right of mother.

अनपत्यस्य पुत्रस्य माता दायमवाप्नुयात् ।

मातर्यपि च वृत्तायां पितुर्माता हरेद्वनम् ॥

The gloss of Kulluka indicates the change in the law since the time of Manu. Vishnu (XVII 7) assigns the mother a place next to father and Yajnavalkya (II. 136) places both parents after the sons.

(b) 1 Stra. H. L. 242 ; 2 Suth. 176 ; *Uma Dey v. Tolawa v. Basawa* 23 Bom. 229.
Gokulamund 5 I. A. 46, 3 Cal. 587 ; *Audh Kumari v. Chandra* 2 All. 561 ; *Jamnabai v. Khimji* 14 Bom 41 ; (c) *Tara v. Krishna* 31 Bom. 495.

The origin of the mother's right to inherit has been based on the fact that she as well as the grandmother and great-grandmother are also *sapindas* as sharing with their husbands the oblations which are offered to them by the male issue (*Lallubhai v. Mankurwarbai* 2 Bom 388, 433). Her claim has been recognised owing to consanguinity and the merit she possesses for having conceived and nurtured the son in her womb. She has been even preferred to the father in this respect (*Mitakshara* II. 3 ; *Dayabhaga* XI. 4, § 2). This reasoning was true of the natural mother but subsequently the adoptive mother also took that place (*Anandi v. Hari Suba* 33 Bom. 404). But the *Dayabhaga* has, (XI. 4 § 2) on the principle of religious efficacy, preferred the father to the mother in the order of succession, because he offers oblations in which the son participates and she confers benefit on him by begetting other sons who may offer funeral oblations in which he will participate.

The right of the widow to be maintained by her husband's heirs has been recognized from the very ancient times. But this right is dependent upon her living a life of chastity. *Narada* (XIII. 28) says, "when the husband is deceased, his kins are the guardians of his childless widow; in disposing of her and in the care of her, as well as in her maintenance, they have full power." The work of *Narada* is decidedly based upon *Manu's* code and so this text shows that there is nothing in this code to countenance her right to inherit.

The next step would be to set apart some amount or property for her maintenance to be left at her own disposal. Such a practice still exists in the Central Provinces (a). This setting apart of a portion of the deceased husband's estate depended upon the wealth and status of the deceased husband as well as upon her performance of her husband's *shraddhs* and discharge of the charities to which he had been accustomed (*Vrihaspati* 3 Dig. 458). Thus in course of time her right to succession became recognised (*Mitakshara* II. 1 § 36 ; *Dayabhaga* XI. 1 § 6). The practice of *niyoga* also helped her in securing the right to inherit. The text of *Gautama* (XXVIII 18, 19) was construed by some to mean that she was entitled to succeed only if she raised up issue to her husband and thus her right under the circumstances was not personal but as guardian of her son. The *Mitakshara*, however, treats this right of succession in the alternative. The male relations of her husband would naturally yield by giving her life-interest in the estate provided she abstained from raising any issue.

(a) *Rama Prasad v. Deo Datt* 27 I. A. 39, 27 Cal. 515.

The condition of chastity upon her right of succession, as advanced by some lawyers is wholly unsupported by the early texts of the Vedas. The question of widow's inheritance arises only in the case of a divided member and she can take by succession as heir but cannot take by survivorship as a coparcener (*Ram Pershad v. Sheochurn* 10 M. I. A. 490). Thus the right of the widow to succeed as heir to her husband's separate property was recognised from the very earliest times by Vriddha Manu (IX. 185, 212, 217), Yajnavalkya (II. 135), Vishnu (XVII. 4), Vrihaspati (XXV. 46, 47 55), Katyayana, Sangha Likhita and Devala (Dig. II. 532). Vriddha Manu says, "The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious ceremonies, shall present his funeral oblations and obtain his entire share."

Vijnaneshwara (II. 1, 29) says, "Therefore it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man, who being divided from his co-heirs and not subsequently re-united with them, dies leaving no male issue." (b) This principle applies only to the separate property of her husband who dies separated and not re-united and leaves no male issue. If a man died before effecting separation from a joint family but left self-acquired property, his widow would succeed to it, though the undivided property would pass by survivorship to his coparceners, as decided in *Shivanganga* case (c). According to the Dayabhaga (XI. 1, 25, 27) which recognised a widow's right to inherit on the ground that she could offer funeral oblations to her deceased husband, she succeeded to his share when he was undivided, just as she would to the entire property of one who was separated (d). She will also be entitled to inherit where the *status* of division has been established by agreement, but no actual apportionment has taken place or only partial partition has been effected (e).

The reasons advanced by Hindu jurists in favour of a widow's claims to succession were based upon the belief that her husband himself was born again and became one person with her (Manu IX. 8, 45); Vrihaspati (3 Dig. 458) also says, "Of him whose wife is not deceased, half the body survives. How should another take the property while half the body of the owner lives?" (f) There is no

(b) *Rwan Pershad v. Mt. Radha* 4 M. I. A. 137, 148; *Suraneni v. Suraneni* 13 M. I. A. 113; *Gajapathi v. Gajapathi* 13 M. I. A. 497.

(c) *Katama Natchiar v. Raja of Sivaganga* 9 M. I. A. 539, 607-11; *Tikai v. Tekari* 5 I. A. 160, 4 Cal. 190; *Periaswami v. Periaswami* 5 I. A. 61, 1 Mad. 312.

(d) *Lakshman v. Satyabhamabai* 2 Bom. 508; *Durga Nath v. Chintamani* 31 Cal. 214.

(e) *Suraneni v. Suraneni* 13 M. I. A. 113, 14 W. R. 40;

Gajapathi v. Gajapathi 13 M. I. A. 497, 6 B. L. R. 202, 14 W. R. 33; *Narayan v. Lakshmi* 3 M. H. C. 289; *Palmi Mai v. Ray Manohur* 3 S. D. 349 (410); *Rawan Pershad v. Mt. Radha Beeby* 4 M. I. A. 137, 148, 152, 7 W. R. 35; *Tonmi Reddy v. Achamma* 2 M. H. C. 325.

(f) *Katama Natchiar v. Raja of Sivaganga* 9 M. I. A. 610, 2 W. R. 32; *Tamburatti Vaba v. Vira Rayyan* 1 Mad. 228.

doubt that this metaphor is only a metaphor and does not prove anything; it gives her preference over sons. But this difficulty would be got over if we study the text of Manu (IX. 104) :

उर्ध्वं पितुश्च मातुश्च समेत्य भ्रातरः समम् ।

भजेत्पैतृकं रिक्त्यमनीशास्ते हि जीवतोः ॥

which lays down that the division of the family estate should not be deferred till after the death, not only of the father, but also of the mother. Besides this the widow has another point in her favour, *vis*, that of offering funeral oblations to her husband. Jimutavahana (XI. 1, 43) applying his theory of religious efficacy held that the sons were superior to her as they performed acts of spiritual benefit from their birth while the widow only after she became a widow. As a mother, she may have claims on her descendants but as a widow her claims are purely personal as between herself and her husband and her claim over and above maintenance is against her husband. So she inherits her husband's separate property. If her marriage be legally dissolved or she may become an outcaste, she will lose her claim to inheritance (*g*). She, therefore, succeeds to the rights or to property which was actually vested in her husband, at the time of his death (*h*). She will equally take, if his title was vested, though his enjoyment was postponed (*i*). No fresh right can accrue to her as a widow in consequence of the subsequent death of some one to whom her husband would have been an heir if he had lived (*j*). The widow of a son (*k*) or of a grandson (*l*), or of a daughter's son, or of a father, or of a brother (*m*), or of an uncle (*n*), or of a cousin (*o*) could not set up any claim to inherit before the enactment of Hindu Women's Rights to Property Act, 1937, which has repealed the rules of the Mitakshara and the Dayabhaga so as to enable the widow to succeed to the coparcenary interest of her husband in the partible property of the joint family and, along with his male issue, to his separate property, and to enable a Dayabhaga widow to succeed along with the male issue both to the coparcenary interest and the separate property of her husband. In some cases where the contest

(g) *Sinammal v. Administrator-General* 8 Mad. 169.

(h) *Varamatradaya* p. 164 S. 13. p. 197 S. 2.

(i) *Rawah Prasad v. Radha Beaby* 4 M. L. A. 137, 176, 7 W. R. 5; *Hurroosondery v. Rajasurie* 2 W. R. 321.

(j) *Balamma v. Pullappa* 18 Mad. 168.

(k) *Ayabullee v. Raj Kissen* 3 S. D. 28, 38; *Rai Sham Bullubb v. Prankishen* 3 S. D. 33, 44; *Himulla v. Mt. Pudo Monas* 4 S. D. 19, 25; *Monas Mohun v. Dhun Monas* 1833 S. D. 910; *Raj Kishore v. Hurroosondery* 1838 S. D. 825; *Anand's Bhee v. Nawnit* 9 Cal. 323; *Raj Amrit v. Bai Manik* 12 B. H. C. 79; *Thuyammal v. Annamalai* 10 Mad. 35; 2 W.

Mac N. 43, 73, 104, 2 Stra. H. L. 233, 234.

(l) *Vencata v. Venkummal* 1 Mad. 210; *Vadrevu v. Wuppuluri* 1861 Mad. 125; *Ram Koommar v. Ummur* 1 Bar 413, 438; *Bhyrobee v. Nubbissen* 6 S. D. 33, 61.

(m) *Yakkiraj v. Tayammal* 1854 Mad. 184; *Peddamsulu v. Appu Rau* 2 M. H. C. 117; *Jymunee v. Ramjoy* 3 S. D. 289, 383; 2 W. Mac N. 78;

(n) *Upendra v. Thanda* 3 B. L. R. 349, Subnominee *Wopendra v. Thanda* 12 W. R. 263; *Gauri v. Rukho* 3 All. 45.

(o) *Soorendranath v. Mt. Heeramones* 12 M. L. A. 81, 1 B. L. R. 26 (P. C.), 10 W. R. 35.

lay between the widow of a sapinda and some other heirs having a preferential title, she was excluded on the general principle that she did not come within the list of heirs at all (p). Finally it was held that the Crown would take by escheat in preference to her (q). The law is still the same in Bengal, Benares and Madras (r) subject to the two new statutory enactments, *vis.*, the Hindu Law of Inheritance (Amendment) Act, 1929, and the Hindu Women's Rights to Property Act, 1937.

The Mitakshara has laid down that the wives of sagotra sapindas are themselves sagotra sapindas and are included in Yajnavalkya's term 'gotraja' (s). The wives of the ancestors have been recognised as heirs by Vijñaneshwara, but he is silent as to the wives of descendants and collaterals. The son's widow, the grandson's widow, the brother's widow and the widows of other sapindas cannot come in before the male sapindas, up to the seventh degree (t). There appears no reason why these widows of descendants and collaterals within seven degrees do not come in before the samanodakas or after the sapindas are exhausted (u). But all the High Courts in India except Bombay have not recognised their right to inherit.

In Bombay the widows of gotraja sapindas inherit as collaterals and are preferred to male gotrajas in a more remote line on the ground that succession goes in the order of sapindaship. In *Lallubhai v. Mankuwarbai* (v) the Bombay High Court accepted the text of Manu (IX. 187):

अनन्तरः सपिण्डाद्यस्तस्य तस्य धनं भवेत् ।

अत उच्चैः सकुल्यः स्यादाचार्यः शिष्य एव वा ॥

"To the nearest *sapinda*, male or female, after him in the third degree, the inheritance next belongs." Vijñaneshwara says that the wives of brothers are also sapindas to each other because they produce one body with those who have sprung from one body; on the same principle the daughter-in-law is a sapinda (w). This rule is limited to women, who marry into a particular *gotra* and become gotraja-sapindas. The widow of a daughter's son would not inherit the estate of the maternal grandfather (x). The result of this doctrine is that "the

(p) *Gaur v. Kishor* 3 All. 45; *Ananda Bhai v. Nornit* 9 Cal. 315.

(q) *Jagdamba Koor v. Secretary of State* 16 Cal. 367.

(r) *Percuriam Lallobhoy v. Cassibai* 7 I. A. 230, 5 Bom. 110; *Vinaydas v. Jeshubai* 4 Bom. 221, per West, J., 11 Bom. 292, per Muttusami Iyer, J., 8 Mad. 119, 127, 129.

(s) Mit. II, 1, 3, 5; *Lallubhai v. Cassibai* 7 I. A. 212, 5 Bom. 110, 118, 121, 123, 125; *Mart v. Chinnammai* 8 Mad. 107, 127; *Jagdamba v. Secretary of State* 16 Cal. 367, 373.

(t) Mitakshara II, 5.

(u) Ibid II, 6.

(v) 2 Bom. 388.

(w) West and Buhler Hindu Law, 451-55.

(x) *Valubhadas v. Sakarbai* 25 Bom. 281, 285; *Nahat Chand v. Hemchand* 9 Bom. 31 (brother's son's widow); *Madhavram v. Dave* 21 Bom. 739 (brother's son's widow); *Kassarbai v. Valab* 4 Bom. 188 (father's widow or step-mother); *Rachava v. Kalingappa* 16 Bom. 710 (paternal uncle's widow); *Lallubhai v. Cassibai* 7 I. A. 212, 5 Bom. 110 (paternal uncle's son's widow); *Roopchand v. Poolchand* 2 Bar. 670 (son's widow).

members of the compact series of heirs specifically enumerated take in the order in which they are enumerated (V. M. IV. 8 § 18) preferably to those lower in the list and to the widows of any relatives, whether near or remote, but where the group of specified heirs has been exhausted, the right of the widow is recognized to take her husband's place in competition with the representative of a remoter line." (y) The males existing in the line of gotraja sapindas within which the gotraja relationship extends exclude the females. For example, the son's widow is the first amongst the widows of gotraja (z). A paternal uncle's son or grandson is preferred to the widow of another paternal uncle of the propositus (a), or his son (b). But the widow of a brother is a nearer heir than the paternal uncle's son (c).

On the general principle of exclusion of women, in all the provinces excepting Bombay and Madras, the daughters of **Women born in the family.** *sagotra* sapindas, whether descendants, ascendants or collaterals, were not recognised as heirs (d). But the son's daughter, the daughter's daughter and the sister have now been recognised as heirs by the Hindu Law of Inheritance (Amendment) Act, 1929. The controversy as regards the sister's right of inheritance has also been set at rest by this Act.

The reason behind the recognition of the right of sister has been given by S. S. Iyengar (at p. 621) in his learned **Right of sister.** treatise: "The sister is declared in some of the Smritis as entitled to take a share either upon an original partition or after a re-union (e). Vrihaspati says, 'If there be a sister, she is entitled to a share of his property. This is the law regarding the wealth of one destitute of issue and who has no wife or father (f).' According to Sankha-Likhita, 'the daughter shall take the woman's property, and she alone is heir to the wealth of her mother's son who leaves no male issue (g).' A text of Vrihaspati is quoted in Jagannatha's Digest: 'But she who is his sister is next entitled to take the share; the law concerns him who leaves no issue, nor wife, nor father, nor mother (h). And Kulluka, explaining Manu, IX. 212, referring

(y) *Nahachand v. Hemchand* 9 Bom. 31, 34.

(z) *Vithaldas v. Jashubai* 4 Bom. 219, 221, son's widow succeeds before paternal uncle's son; *Appaji v. Mohun Lal* 54 Bom. 564, 591 F. B. (son's widow preferred to brother's son's son); *Kachava v. Katsangappa* 16 Bom. 716; *Pranjivan v. Bai Bhikhi* 45 Bom. 1247; *Raghunath Shankar v. Laxmibai* 59 Bom. 417 (widow of paternal uncle preferred to father sister).

(a) *Kashibai v. Morasvar Raghunath* 35 Bom. 389.

(b) *Lalluhoy v. Cassibai* 7 I. A. 212, 5 Bom. 110.

(c) *Basangavda v. Basangavda* 39 Bom. 87.

(d) *Nanht v. Gauri Shankar* 28 All. 187; *Jagan Nath v. Champa* 28 All. 307; *Jang Bir v. Mi. Jamna* 12 Lah. 534.

(e) Manu IX, 118, 212; Vishnu XVIII, 35; Yaj. II, 124; Vrih. XXV, 75, 64; Narada XIII, 13; Dig. II, 554.

(f) Vrih. XXV, 75.

(g) Dig. II, 553. The comment of Jagannatha, following Ratnakara, is that it refers to the succession as sister of one who was an appointed daughter and therefore had the status of a brother. See Vivadaratnakara XIX, 10-11.

(h) Dig. 534.

to a re-united brother affirms the sister's succession if he leaves neither son nor wife nor father nor mother (*i*). Nanda Pandit and Balambhatta interpret the text of the Mitakshara which gives the right of inheritance to brothers, as including sisters, so that the brothers take first and then the sisters (*j*). But this view is opposed to the whole spirit of Benares law. It is not accepted even by the Mayukha, which makes the sister come in after the grand-mother under a different text (*k*), and has also been rejected by the Judicial Committee (*l*)."

In Bombay a sister is treated as a *gotraja* sapinda owing to her being born in her brother's family and she does not lose her position as a *gotraja* by acquiring her husband's *gotra* on her marriage. Therefore, she has been given a place among the *gotraja* owing to nearness of kin, between grandmother and grandfather (*m*), before the half-brother and after the full-brother's son under the Vyavahara Mayukha (*n*), but under the Mitakshara only after the half brother and his son (*o*). It is a clear rule that a wife on her marriage enters her husband's gotra and the blood gotraship of women cannot be extended beyond the sister (*p*). Vijnaneshvara's clear rule is that every wife is a sagotra sapinda of her husband (*q*). Nilkantha took care to point out that the sister is not on her marriage of the same gotra as her brother (*r*) and *gotrajas* mean *samanagotra sapindas* which point of view has been followed (*s*) though it is in conflict with the Mitakshara.

Her right to be an heir has been admitted in Madras as well. In *Lakshmanammal v. Thiruvengadam Mudali* (*t*), the Madras High Court observed: "In discussing the right of widow, Vijnaneshvara explains the text cited in support of the doctrine that women are incompetent to inherit in a sense which would justify the recognition of the claims of female heirs generally. He nowhere expressly accepts the position that the

(i) This seems to be the opinion of Sarvajna Narayan and Ragavananda. See Dr. Bühler's note on Manu IX. 212.

(j) Mit. II. 4 S. 1, note. This interpretation was accepted in *Sakharam v. Sitabai* 3 Bom. 353, as one ground for admitting a sister to succeed. *Kesserbai v. Vajab* 4 Bom. 188, 204; *Rudrapa v. Irava* 28 Bom. 82 Chandavarkar, J., in *Bhagwan v. Warubai* 32 Bom. 300 rejecting this interpretation, confining it to cases governed by the Mayukha alone.

(k) V. May. IV. 8, 19; *Bhagwan v. Warubai* 32 Bom. 300, 311.

(l) *Thakoorain v. Mohun* 11 M. I. A. 386, 402; *Chinnamai v. Venkatachala* 15 Mad. 421, 422.

(m) V. May. IV. 8, 19-20; *Vinayak v. Luximabai* 9 M. I. A. 516, affirming 1 B. H. C. 117; *Lalubhai v.*

Mankuvarbai 2 Bom. 388, 445; *Lakshmi v. Dade Nanaji* 4 Bom. 210; *Beru v. Khandu* 214; *Rudrapa v. Irava* 28 Bom. 82; *Mulji v. Cursandas* 24 Bom. 563; *Bhagwan v. Warubai* 32 Bom. 300, 311, 312; *Appaji v. Mohanlal* 54 Bom. 564, 595 F. B.; *Bai Kesserbai v. Hansraj* 33 I. A. 176, 30 Bom. 431, 442.

(n) *Sakharam v. Sitabai* 3 Bom. 353; 24 Bom. 563 supra; 32 Bom. 300, supra.

(o) *Hari Anaji v. Vasudeo Janardan* 38 Bom. 438, *Bhagwan v. Warubai* 32 Bom. 300.

(p) *Lalubhai v. Mankuvarbai* 2 Bom. 388, 446.

(q) Mit. on Yajñ. I. 52.

(r) V. May IV, 8, 19.

(s) Mit. II. 1, 3.

(t) (1882) 5 Mad. 241, 249, 250 following *Kutti v. Radha Krishna* 8 M. H. C. 88.

claims of such females only are to be admitted as have the support of express texts. He himself declares that certain female ancestors not denoted in express texts are *sagotra* heirs, *e.g.*, the great-grandmother. He does not pretend to give an exhaustive list either of the *sagotra* or *bhinna gotra* sapindas. Vijnaneshvara recognised the texts excluding females so far as to give priority to males and he indicates with sufficient clearness the rules which are to be observed in ascertaining the order of succession . . . As a *bhinna gotra* sapinda, a sister falls within the definition of a bandhu and, except on the construction of the rule respecting female inheritance that it absolutely excludes all but certain expected females and does not merely postpone their claims, there seems no sufficient reason for refusing her the position to which this court has declared her entitled." The text of Sankha-Likhita, as cited above, has been referred to, but that of Vrihaspati cited by Jagannatha has not been noticed (u). The unassailable reasoning of the judgment applies equally to daughters of all descendants, ascendants and collaterals within five degrees. This view has been re-affirmed on the examination of the authorities in *Venkatasubramaniam v. Thayarammal* (v). So it has held that a father's sister, son's daughter, a daughter's daughter a brother's daughter, and a sister's daughter are *bhinna gotra* sapindas or bandhus within the meaning of the Mitakshara and are not precluded by their sex and are in the line of heirs.

SECTION 6. PLEDGE

In the texts of Hindu Law, pledge **आधि** has been dealt with under the heading "Debts." Pledge is treated as security for the payment of a debt. Narada (I. 117) says, "Surety and pledge, these are the two sources of ensuring the confidence of creditor." **विश्रम्भहेतुत्वावन्न प्रति भूराधिरेव च ।**

The Mitakshara (cited in Yajnavalkya II. 57) defines it thus, "Whatever is placed under the control of the creditor by the debtor as a security for the thing lent to him is called an *adhi*."

Pledge : Its definition.

आधिर्नाम गृहीतस्य द्रव्यस्योपरि विश्वासार्थमधमर्णोत्तमर्णोऽधिक्रियते

— आधीयते इति आधिः ॥

Narada first divides it into two classes, *viz.*, (i) that redeemable within a definite time and (ii) that given for an indefinite time until the repayment of the debt, and these are again sub-divided in two categories, in

Its classification.

as much as they may be either for custody or for use,

आधिक्रियते इत्याधिः स विज्ञेयो द्विलक्षणः ।

कृत कालोपनेयश्च यावत् देयोद्यतस्तथा ॥

सपुनर्द्विविधः प्रोक्तो गोप्यो भोग्यस्तथैवच ।

[Narada I. 224]

Vrihaspati's division, (cited in Viramitrodaya on Adhi) gives eight divisions *viz.*, (1) movable, (2) immovable, (3) for custody, (4) for use, (5) discretionary, *i.e.*, without a time-limit, (6) with a fixed time-limit, (7) evidenced by a document, and (8) evidenced merely by witnesses.

आधिर्वन्धः समाख्यातः स च प्रोक्तश्चतुर्विधः ।

जङ्गमः स्थावरश्चैव गोप्योभोग्यस्तथैवच ।

यादृच्छिकः सावधिश्च लेख्यारुद्धोऽथसाक्षिवान् ॥

This divergence in classification has been cleared by an explanation of Kalpataru that though the divisions are eight, yet the principle of classification is really four-fold according to the (1) nature of the property pledged, (2) form of the pledge, (3) time relation and (4) nature of the evidence by which pledge is supported.

स्वरूप प्रकार काल प्रमाणैश्चतुर्विधत्वम्

There are two kinds of pledges in respect of which no foreclosure is allowed and the creditor must take his money with interest to which alone he is held entitled. They are (1) pledges of good faith or according to another interpretation चरित्रवन्धक, (2) pledges of solemn promise सत्यङ्कारकृत । In the former case, there is a great difference

Two special kinds of pledges.

between the value of the pledge and the sum advanced, as such a pledge is taken as a token of good faith of the creditor on the one hand and of the debtor on the other. The expression चरित्रवन्धक may also signify a pledge of religious merit whereby the debtor stipulates that he shall not perform a particular act of religious merit or if he performs it the benefit thereof shall go to the creditor, until the debt is paid off. In all such cases the creditor has no right of forfeiture as it entails a great hardship upon the one or the other, yet a right of sale at a proper time has been allowed.

The latter class of pledge implies that there would be no foreclosure by means of the contract of the parties. In cases of sale, if there remains a surplus, the debtor becomes entitled to it; but nothing has been said of the case when the sale proceeds fall short of full satisfaction of the creditor's claim. The methods of carrying out the sale are that

the creditor must give due notice of sale to the debtor, and in case of the latter's death or when he is not traceable, in the presence of witnesses, or he may exhibit it at a public place for ten days after having fixed the price; if in that period the debtor does not come forward and repay the debt the sale will proceed and the debt will be satisfied out of its proceeds. Katyayana (cited in Viramitrodaya on Adhi) says that in such a case the creditor should sell the pledged article after producing it before the king and obtaining his permission, and the surplus sale-proceeds will remain with the king for the benefit of the debtor.

आधाता यत्र वै न स्याद्धनी वन्धं निवेदयेत् ।

राज्ञस्ततः स विज्ञातो विक्रेय इति धारणा ॥

संवृद्धिकं गृहीत्वातुशेषं राज्ञे समर्पयेत् ॥

It also appears from a text of Manu (VIII. 143), *vis*, "However long the time may be neither an assignment nor a sale of pledge can be made." न चाधेः कालसंरोधाद्भि-
A pledge created a real right.

सर्गाऽस्ति न विक्रयः that the creditor had only a right of detention; Mitakshara's explanation that it refers to a pledge for use does not appear to be sound. Whatever the circumstances may have been at the time of Manu, subsequent well-developed rules regarding pledges show that a real right was created in the pledgee, which under certain conditions and on expiry of a certain period, would either ripen into full ownership or entitle him to sell the property. This right appertains to property itself and is distinguishable from the personal liability of the debtor to pay the debt. This position is clearly supported by the Mitakshara in these words, "The giving of a pledge is well recognised among the people as a conditional cause of extinction of property, and the acceptance of a pledge as a conditional cause of acquisition of property, so that after the debt had doubled or the stipulated time had arrived, the right to satisfy the debt ceased, and by virtue of the text of Yajnavalkya which is being commented upon, the debtor's right was extinguished for ever, and the creditor's ownership became absolute."

A security may become real or substantial in three ways:—(1) through authority to enjoy, (2) through authority to foreclose and (3) through authority to sell. All these rights were recognised by Hindu Law, so a pledge conferred a real right on the pledgee.

Viramitrodaya says that the right to create a sub-mortgage follows as a natural corollary from what has been said above regarding creation by the pledge of a real interest in the pledgee. It is also evident from a text of
Power to create a sub-mortgage.

Prajapati. "A sub-mortgage cannot be created for more than the principal money due by the debtor." This is to avoid any confusion between the rights of the mortgagor and the sub-mortgagee.

The mortgagee has also the right to demand fresh security, or in the alternative, payment of the mortgage debt on the determination, loss or destruction of the pledge without the fault of the pledgee, caused by an act of the king or an act of God. The provisions of Section 68 of the Transfer of Property Act are also to the same effect. This shows the height of development of ancient Hindu system of law and the wonder is how human reason bridges over the gulf of time and space and arrives at similar results.

The duties of the pledgee may be said to be: (1) to observe proper care in keeping and using the pledge, (2) not to use or enjoy the pledge when it has been given merely for custody and (3) to return the pledge on the realisation of the debt. When the thing pledged is spoiled owing to the negligence of the pledgee, he is liable to restore it in its original condition or pay its price. When the pledge is for use, no interest can be claimed by the pledgee. In case of total destruction of the pledge, the pledgee cannot claim the principal without paying the price of the pledge as a compensation; and in case when the object of pledge is greater in value than the principal and the interest payable to the pledgee, the balance may be claimed by the pledgor. The pledge is to be returned when the debt has been paid off. If the pledgee be absent, the debt may be paid to the members of his family and the pledge taken back; if no person is available the effect of the tender of the debt would be that the interest would cease to run from the date of the tender.

The pledgor can sell the pledged property even during the continuance of the pledge, as his ownership is not affected in any way, and in such a case, the vendee steps into the shoes of the pledgor and can redeem it. In early Hindu Law a second mortgage could not be created as Katyayana says, "If a person pledges a property to two individuals, then the first transaction shall prevail, and the pledgor shall be punished like a thief" [Cited in Viramitrodaya on Adhi].

Rights of the pledgor.

Rights, duties and liabilities of the parties to a pledge.

आधिमिकं द्योयस्नु कुर्यात् का प्रतिपदंभवेत् ।
तयोः पूर्वकृतं ग्राह्यं तत्कृतां चौरदण्डभाक् ॥

Creditor's duty in case of pledged goods :—

Subject to natural wear and tear, a creditor shall preserve the goods pledged whether movable or immovable in the same condition in which they

were deposited (Harit).

बन्धः यथास्थापितः तथैव परिपालयेत् ।

अन्यथा नश्यते लाभो मूल्यं नश्येत् व्यतिक्रमात् ॥

Creditor, using गोप्य or damaging भोग्यः—

A creditor shall not use a pledge given to him for custody nor shall he cause damage to pledge given for use, and a creditor doing either of these things shall not be entitled to interest.

गोप्याधिभोगे नो वृद्धिः सोपकारेऽथ हापिते ।

नष्टो देयो विनष्टश्च दैवराज कृतादूते ॥ [Yaj. II. 59]

Creditor's liability when pledge is spoiled or destroyed:—

A pledge spoiled or destroyed unless by an act of God or king shall be made good by the creditor.

The debtor is bound to give another pledge or to pay the principal with interest, if the pledge is destroyed by an act of God or king or is lost when carefully kept.

आधीदयं तु यत् किञ्चिदपि नष्टं देवराजयः ।

तमर्णं सोदयं दाप्यो धनिनामधमर्णकः ॥

As Yajnavalkya (II. 60) also observes :

आधेः स्वीकरणात् सिद्धो रक्ष्यमाणोऽप्यसारताम् ।

यातश्चेदम्य आधेयो घनभाग्वा धनी भवेत् ॥

Different grades of right of mortgage:—

(1) Mortgage of the same property to different mortgagees at different times is disallowed because a pledge is valid only when it is actually given in possession of the creditor. For that reason only the first mortgage is valid in the case of repeated mortgages of the same property with different creditors, but if it is mortgaged with various creditors at the same time, the priority of the possession is the determining factor.

आधौ प्रतिग्रहे क्रीते पूर्वातु वलवत्तरा ।

As Vashista observes:—

तुल्य बाले विसृष्टाच्च लेख्यानामधिकर्मक ।

येन भुक्तं भवेत् पूर्वं तस्याधिर्वलवत्तरः ॥

यद्येक दिवसे तौ तु भोक्तु कायावपागतौ ।

विभज्याधिः समस्तत्र भोक्तव्य इति निश्चयः ॥

And Katyayana says:—

आधिमैकं द्वयोर्यस्तु कुर्यात् का प्रतिपदुभवेत् ।

तयोः पूर्वकृतं ग्राह्यं तत्कर्ता चौर दण्डभाक् ॥

A pledge shall be forfeited when the principal is doubled or when the term of redemption expires.

As Yajñavalkya [II. 58, 64] says :

आधिः प्रणश्येत् द्विगुणे धने यदि न मोच्यते ।
काले कालकृतो नश्येत् फल भोग्यो न नश्यति ॥
यदा तु द्विगुणीभूतमृणमाधौ तदा खलु ।
मोच्य आधिस्तदुत्पन्ने प्रविष्टे द्विगुणे धने ॥

A debtor could at any time redeem the pledged property on payment of the debt and the accumulated interest which according to the rule could not exceed the amount of the principal. [Yajñavalkya II. 62].

उपस्थितस्य मोक्तव्यः आधिः स्तेनोऽन्यथा भवेत् ।
प्रयोजकेऽसति धनं कुलेन्यस्याधिमाम्रयात् ॥

Right of creditor to sell : Similarly a creditor may sell the pledge in the presence of witnesses, if the debt is doubled with interest, and the debtor is either dead or has absconded. As Yajñavalkya says :

तत्कालकृतमूल्यो वा तत्र तिष्ठेदधुद्विकः ।
बिना धारणाकाङ्क्षापि विक्रीणीत ससाक्षिकम् ॥

And Vrihaspati observes :

हिरण्ये द्विगुणीभूते भूतेनष्टेऽधमर्णिके ।
द्रव्यं तदीयं संगृह्य विक्रीणीत ससाक्षिकम् ॥
रक्षेत् वा कृतमूल्यान्तु दशाहञ्जनसंसदि ।
ऋणानुरूपं परतो गृहीतान्यत्तु वर्जयेत् ॥

'Pledge cannot be prescribed.' The principle that pledges cannot be prescribed was also recognised and this principle had its special application in the case of usable pledges मोच्य which were to be given back to the debtor as soon as the redoubling of the debt took place as the result of accumulation of interest and the whole amount which is thus due is realised from the usufruct.

Usufructuary pledge is never forfeited,

Again Yajnavalkya [II. 64] says :

यदा तु द्विगुणीभूतमृणमाधौ तदा खलु ।
मोक्ष्य आधिस्तदुत्पन्ने प्रविष्टे द्विगुणे धने ॥

Similarly Vihaspati observes :

क्षपादिकं यदाभुक्तमुत्पमधिकं ततः ।
मूलादेयं प्रविष्टे चैनदपि प्राप्नुयात् ऋणी ॥

In the case of चरित्र (friendly) pledge or in case when the debt is contracted and chattels delivered as an earnest, the principle is that the pledge is not forfeited even when the furthest limit of interest is reached. As Yajnavalkya (II. 61) observes :

चरित्रबन्धकृतं सवृद्ध्या दापयेद्धनम् ।
सत्यङ्कारकृतं द्रव्यं द्विगुणं प्रतिदापयेत् ॥

These were the conditions of foreclosure under the Hindu Law ; but the right of sale to the pledgee was given as an exception to the right of foreclosure or where the right of foreclosure could not be exercised.

The incidents of a pledge vary according to its nature and class. When the pledge is for a definite period, the pledgor loses his right to redeem if he fails to do so within that period irrespective of the fact whether the pledge was for mere custody or for use. But when the pledge is for custody the right of redemption is lost when the debt doubles itself, as it represents the maximum interest allowed by Hindu Law which generally does not allow accumulation of interest in excess of the principal. In both cases the law allowed a period of grace which generally extended to two weeks, within which the debt could be paid and the property released. In case of a pledge for use having no fixed period by contract, the debtor could redeem it whenever he pleased and in that case there would be no forfeiture.

A further distinction has been made in this sort of pledge for use. The usufruct may be enjoyed in lieu of interest or it may go to satisfy the principal as well. When the creditor is in possession of the property pledged and the usufruct is enjoyed in lieu of interest, it will be the duty of the pledgor to pay off the debt and get the pledge redeemed. In the latter case when the principal also is to be satisfied out of the usufruct, there cannot be any forfeiture, and the property will be redeemable on satisfaction of the debt. It is known as क्षयाग्नि or a pledge that exhausts the debt. It resembles the *vivum vadium* of the old English Law. When the pledged property unexpectedly

acquires an additional value or deteriorates in value, the increase or decrease in the usufruct shall, in the absence of a contract to the contrary, be taken into account at the time of the redemption of the property, *i.e.*, the debtor shall have to pay less than the principal in the one case and more than the principal in the other. The pledgee is bound to release the property upon the satisfaction of the debt before the foreclosure becomes absolute. In an exceptional case, when the usufructuary mortgage is for a fixed period it cannot be redeemed before its expiry even on payment of the debt due.

A pledge for custody has been distinguished from a pledge for use, but no mention appears to have been made of a **Pledge without possession.** pledge without delivery of possession. This question was raised for the first time in the case of *Shibachandra Ghosh v. Russickchandra Neogly* (Fult. 36) and the majority of the Judges of the Supreme Court of Calcutta relying upon some of the texts of Hindu Law as well as upon the general usage of the country held that whatever might have been the case in early times, the later Hindu Law recognised the validity of a pledge although unaccompanied by possession. But Mr. Justice Grant held otherwise as being in conformity with the general principles of natural law. It is difficult to follow this argument, and Dr. Ghosh points out, 'If it were not for the peculiar views about the law of nature so widely prevalent at the time, Mr. Justice Grant could hardly have failed to perceive that the Hindu Law might have been developed in course of time in the same manner as the Roman Law was developed by the introduction of hypothecation.'

A pledge was required to ensure the confidence of the creditor, so in the early stages of society it might have served that purpose and the recognition of hypothecation is a later juridical phenomenon. In the natural course of events, just as in the later Roman Law, the altered conditions of the primitive societies led to the recognition of mere hypothecation without delivery of possession. A similar transition took place in Hindu Law. It is true that our Dharma-shastras do not contain much evidence of the prevalence of hypothecation, and the incidents of the law of pledge and the rights and obligations arising under it go to show that it must be placed under the control of the creditor as a security for the payment of the debt. The definition of the term 'adhi' shows that it must be placed under the control of the creditor to ensure his confidence, which is supported by the etymology of the word **आधीयते इत्यादि**. The same conclusion is supported by the two classifications of a pledge, *e.g.*, for custody **गोप्य** and for use **सोप्य**. The disadvantages that accompanied the hypothecation were,

such that a Hindu creditor could have reposed more confidence in a solemn promise such as a pledge of religious merit चरित्र बन्धक in which the debtor says to the creditor 'until I repay the loan I will not bathe in the Ganges' or 'the benefit of my ablution in the Ganges shall accrue to you,' than in such a security. This can be inferred from the texts of Yajñavalkya (II, 60)—'By the acceptance of a pledge its validity is maintained.' आधेः स्वीकरणात् सिद्धिः । and of Narada (I, 139) 'Pledges are declared to be of two sorts, immovable and movable and both are valid when there is actual enjoyment, and not otherwise.'

आधिस्तु द्विविधः प्रोक्तः स्थावरो जङ्गमस्तथा ।

सिद्धिरस्योभयस्यापि भोगो यद्यस्ति नान्यथा ॥

[Narada I. 139]

गोप्याधौ भोगः स्वीकारः भोग्याधौ फलभोगः ।

[Viz.]

All these considerations go to show that a pledge without delivery of possession was not generally recognised.

There is no mention of hypothecation in the Mitakshara. There is a text of Vrihaspati which is referred to in support of the recognition of a pledge without possession: "Of him who does not enjoy, a pledge, nor possess it, nor claim it on evidence, the written contract for that pledge is nugatory like a bond when the debtor and witnesses have deceased. (x) This text lays down a rule of evidence, so it also does not lead to any definite conclusion. Dr. Ghosh suggested, that "change from *adhi* to *bandhaka* marks the progress from a pledge with possession to a pledge not followed by delivery, or in other words to hypothecation." Dr. Ghose's argument which is based on the etymology of the word "*bandhaka*" is not conclusive, as the two words *adhi* and *bandhaka* are very often used as synonymous.

Katyayana (cited in Viramitrodaya on Adhi) discussing the priority of two pledges remarked, "If a pledge, a sale, or a gift of the same thing be made before witnesses to one man, and by a written instrument to another, the writing shall prevail, because one transaction only can be maintained."

आधानं विक्रयोदानं लेख्यसाम्पत्तिकृतं तथा ।

एकक्रियाविरुद्धन्तु लेख्यन्तत्रापहारकम् ॥

While commenting on this text, Jagannatha remarked, "Halayudha says if there be no occupancy, but a writing exists duly attested and so the writing shall prevail because it is the best evidence of a transaction; it shall establish the mortgage. It is hereby intimated that in case of written and verbal contracts, a mortgage is not of

(x) Ghosh on Mitakshara, p. 148.

course invalid for want of occupancy." (y) The opinion of Halayudha, the Chief Judge in the reign of Lakshmana Sen, one of the kings in Bengal, is significant on the point. Dayatattva's text lays down that according to Raghunandana also a pledge without possession was recognised in Bengal. It says, "Thus also if the pledge be not redeemed by reason of death or the like of the seller or donor, it may be redeemed by the buyer or donee, because a right equal to that of the former owner has been generated by the sale or gift. In such a case if a dispute arises as to the source of the right, then the buyer or the donee (who is admitted as such) is required to prove his possession, and not the commencement of his title." (z) Nilkantha referring to a text of Vrihaspati in which the words *adhi* and *bandha* are used to denote different meanings says that the word 'bandha' be taken to mean an agreement of this form *vis*, "I shall not make a gift, sale, pledge, or other disposition of this house or field, or other property until the debt I owe you is clearly paid off" This explanation supports the opinion of Dr. Ghose.

यावत्सावकमृणं न शोभ्यते तावदेतद् गृहक्षेत्रावेदनां
विक्रयाधिकरणाद्यहं न करिष्यामीति निर्बन्धोबन्धः ।

It will be instructive to trace the successive stages which led to this divergence of opinion, and the text of Vrihaspati may in this connection be cited with advantage: "a creditor should give a loan either attested by a document or in the presence of witnesses after obtaining an *adhi* or a *bandhaka* of adequate value or a reliable surety."

परिपूर्णं गृहीत्वाधिं बन्धं वा साधुलभ्यकम् ।
लेख्यारुहं साक्षिमद्रा ऋणं दद्यादानीं सदा ॥

The two terms *adhi* and *bandhaka* have been used to denote different meanings, and Viramitrodaya in explaining it cited a text of Narada (cited in Viramitrodaya on Nikshepa) which states that the term 'bandha' means a property placed in the hands of a friend for the confidence of a creditor :

निक्षेपो मित्रहस्तस्यो बन्धो विश्वासकः स्मृतः ।

The placing of the property in the hands of a third party marks the *first stage* in the transition from a pledge with delivery of possession to the creditor to a pledge by mere hypothecation in which the third person is to produce the property in case the debtor does not fulfil his promise to pay off the debt. The *second stage* was reached when the third person who worked as a stake-holder undertook to become a

surety for the production of the pledge. While Yajnavalkya (II. 53) mentions only three classes of sureties *vis.*, for appearance, for trust, and for payment,

दर्शने प्रत्यये दाने प्रातिभाष्यं विधीयते ।

other jurists gave a fourth class, *vis.*, a surety for the production of the pledge or debtor's property ऋणिद्रव्यार्पण प्रतिभू or, more correctly, a surety for the production of pledge taken गृहीत बन्धोपस्थान प्रतिभू ।

The *third* or the last *stage* was reached when the intervention of a third person was dispensed with and the transaction was known as a hypothecation.

Dr. Sen, the learned Tagore Law Professor on Hindu Jurisprudence observes, "On giving the matter my best consideration I have come to the conclusion that our Dharma-shastras do not contain much evidence of the prevalence of hypothecation; on the other hand the scheme of the law bearing upon the subject and the rights of obligations arising under it all go to show that a pledge involved the placing of a property of the debtor under the control of a creditor as a security for the payment of the debt." He argues that the very definition of the term "adhi" denotes a thing placed under the control of the creditor in order to ensure his confidence and that the etymology of the word आधीयते इत्याधि: supports this view. The division of a pledge into two classes गौय (for custody) and भोग्य (for enjoyment) also suggests the same conclusion. It therefore follows that pledge without possession was prevalent in Hindu society in ancient days.

SECTION 7. BAILMENTS AND OTHER INCORPOREAL RIGHTS

A bailment is the act of entrusting the property in the control of another out of trust reposed in him and not as a security for the performance of any obligation. The rights of a pledgee are much more wide than those of the bailee as owing to the relationship of a debtor and a creditor between the pledgor and the pledgee, the pledgee gets a real or substantial interest in the property pledged, while in the case of a bailment, such is not the case.

Hindu Law recognised these kinds of bailments: (1) an open deposit made in the presence of the bailee after showing him the nature and quantity of the thing deposited *i.e.*, *nikshepa*, निक्षेप (2) an open and ascertained deposit entrusted in the absence of the bailee with the members of his family *i.e.*, *nyasa*, न्यास (3) a deposit under a sealed

Difference between bailment and pledge.

Different kinds of bailments.

cover of which the nature is consequently not disclosed to the bailee *i.e.*, *upanidhi*, उपनिधि (4) a bailment for delivery *i.e.*, *anvadhita*, अन्वाहित (5) a loan for use *i.e.*, *yachitaka*, याचितक (6) a deposit with an artist *i.e.*, *silpinyasa* शिल्पिन्यास, *e.g.*, gold given to a goldsmith for preparing ornaments; and (7) a deposit made in return for a deposit received, or mutual bailment, *i.e.*, *pratinyasa*, प्रतिन्यास । The incidents of these bailments were more or less similar.

Except in cases of a loan for use or deposit with an artist, the bailee accepts the duty of keeping the deposit safe without deriving any benefit out of it, and it becomes a risky undertaking. Vrihaspati has therefore extolled it as a meritorious act (cited in Viramitrodaya on Nikshepa) Besides religious considerations, a bailment creates legal obligations and according to Vrihaspati you should not accept a bailment at all, but if you do, the very fact of your acceptance creates certain liabilities and you must preserve it with care and return it on the first demand.

It is the duty of the bailee to preserve the property with care and if any loss or deterioration occurs owing to his want of care, he is responsible for the loss and will have to compensate the bailor. The measure of the care to be exercised by him is to the same extent as he would have taken of his own goods. A bailee cannot be held responsible for any loss if it arises from an act of the king or an act of God, as it is beyond his control. Theft was placed in the same category as an act of God; but a bailee was not exonerated if the apparent excuse was created by him for fraudulent purposes.

Unlike the Hindu system of jurisprudence, the responsibility as regards a loan for use and a bailment for mere custody was different under Roman Law. Regarding a loan for use or commodatum the institutes of Justinian lay down, "He who has received a thing lent for his use, is indeed bound to employ his utmost diligence in keeping and preserving it; nor will it suffice that he should take the same care of it, which he was accustomed to take of his own property, if it appear that a more careful person might have preserved it in safety; but he had not to answer for loss occasioned by superior force or extraordinary accident, provided the accident is not due to any fault of his;" on the contrary, with reference to a deposit, by which is meant a gratuitous bailment for mere custody, it is stated that "a person with whom a thing is deposited . . . is only answerable if he is guilty of fraud, and not for a mere fault, such as carelessness or negligence; and he cannot,

therefore, be called to account if the thing deposited, being carelessly kept, is stolen. For he who commits his property to the care of a negligent friend should impute the loss to his own want of caution." (x) The Roman Law, therefore, seems to be that in a gratuitous bailment, the bailee cannot be held accountable or responsible for his negligence except on the ground of fraud; but the Hindu Law does not make any distinction whether the bailment is gratuitous or with some consideration; so the rules of Hindu Law in this respect are more just and reasonable.

It is the bounden duty of the depositary to return the deposit on the first demand. On default to do so, he becomes liable for all subsequent losses even if caused by an act of the king or an act of God (Vyasa):

Duty to return the deposit on demand.

याचनान्तरं नाशे दैवराजकृतेऽपि सः ।

गृहीता प्रतिदाप्यः स्यान्मूल्यमात्रं न संशयः ॥

Vyasa has laid down that in the above mentioned particular cases the depositary should not be called upon to pay more than the actual price as compensation. There is an exception to the rule for the return of the deposit on demand and it is in case of a loan for use when the bailee obtains a thing for another for using it on a particular occasion or for a particular period of time and the demand for the return is made when his work is half finished (Katyayana):

यदितत्कार्यमुद्दिश्य कालम्परिनियम्य वा ।

याचितोऽर्द्धकृतो यस्मिन्नप्राप्ते न तु दाप्यते ॥

There is a similar rule in the Roman Law also. The Hindu Law lays down a further exception to this exception to the effect that if it may so happen that the lender will suffer if he waits till the expiration of the time agreed upon, then the borrower should return the thing borrowed although his work may have been only half-finished (Katyayana cited in Viramitrodaya).

अथकार्यं विपत्तिस्तु तस्यैव स्वामिनो भवेत् ।

अप्राप्ते वै सकाले तु दाप्यस्त्वर्द्धकृतेऽपितत् ॥

This provision is most fair and equitable as it is a gratuitous transaction and the bailor should not be made to suffer any financial loss arising therefrom.

The deposit should be returned in the same condition as it was when it was taken. Vrihaspati was cautious enough to add that the bailee should not make it over to any person other than the bailor,

although he may claim to be the owner of the thing, not even to the sons or other close relations of the bailor, so long as he is alive (Vrihaspati cited in *Vuṣmitrodaya*):

स्थापितं येन विधिना येन यच्च यथाविधि ।

तथैव तस्य तद्देयं न देयं प्रत्यनन्तरे ॥

स्थापयितेतरस्य यस्य स्थापितं द्रव्यत्वमस्ति स इह प्रत्यनन्तर उच्यते ।

इति स्मृतिचन्द्रिकायां, प्रत्यनन्तरे पुत्रादाविति कल्पतरौ ॥

The rule of estoppel applicable to the case of a bailment as laid down in section 116 of the Indian Evidence Act is practically the same. When the bailor is dead, the thing may be returned to his heirs. Ordinarily the bailee may return the deposit whenever he pleases, but if the return is due to some anticipated danger, it should not be returned before the danger had passed over, if the bailee knew of the bailor's motive. If any loss happens on account of such a premature return **कालहीन** the bailee renders himself liable to be punished.

SOME INCORPOREAL RIGHTS

The right of pasturage is an important right for an agricultural country like India. Yajñavalkya (II, 166) says that **(1) Right of pasturage.** in every village there should be land set apart for pasturage either by the common consent of the villagers, or by a special order of the king.

ग्रामेच्छया गोप्रचारे भूमी राजवशेन वा ।

The true significance of this text is that in case of disagreement between the villagers, the king should interfere and compel them to provide for pasturage. Our lawgivers have given details of lands to be set apart as pasturage for villages and cities. These details furnish and prove the theory that individual ownership has gradually grown out of collective ownership or joint ownership of the entire community. The explanation given by Yajñavalkya presupposes *individual ownership* as distinguished from joint ownership of all villagers over all the lands of the village; for he states that 'lands are set apart for pasturage by the wish of the whole village or by the control exercised by the king.'

ग्रामेच्छया गोप्रचारे भूमी राजवशेन वा । This shows that there was no communal or joint ownership of the lands in and around the village. Dr. Sen (at p. 225) says: "Originally the custom of setting apart some lands for pasturage at the outskirts of the village had its basis on communal ownership, but that when in Yajñavalkya's time that kind of ownership had been superseded by individual or rather family ownership, the only explanation which he could put forward to account for the existence of these common pasture grounds was that they must

have been set apart either by the common consent of the villagers or by an order from the king but what I wish to impress upon you is that our Dharma-shastras had long outgrown the stage of communal ownership, so that even in explaining phenomena which might be considered to be relics of the old system, they proceeded upon the assumption of a new order of things based upon a new system of holding lands."

Other incorporeal rights, such as the right of way, including the private right of way, the rights appurtenant to a tenement, co-relations between the owners of adjacent lands, digging wells and raising embankments on another's field, cultivation of another's land, the owner being either dead or absent since long or otherwise unable to till it, and the right to take fuel and fruit from trees outside an enclosure were fully recognised by the early Hindu Law.

II. Rights of easement, e. g., way etc.

CHAPTER IV

LAW OF CONTRACT

SECTION 1. INTRODUCTION

The distinct treatment of contracts in general as distinguished from special topics, such as, recovery of debts, partnership, surety, agency, *etc.*, does not find any place in Hindu Law. These separate topics have been elaborately discussed with respect to the rights and liabilities enforceable by the court. Our Dharma-shastras as well as *commentaries* and *nibandhas* have based the treatment of positive law on Manu's topics of litigation or forms of action, as well as of other law-givers, with the result that different subjects were presented, not so much from the stand-point of positive rights arising from various transactions, as from the stand-point of transgressions providing causes of action to be taken cognisance of by the court. The Hindu jurists were, therefore, mostly led to determine in what ways the various kinds of contractual obligations may be broken and in finding out the remedies for the breaches thereof. In the matter of a general law of contract, Hindu jurisprudence may appear to be incomplete or defective but it would not be unprofitable to study the history of the development of the law of contract in England where even till the middle of the thirteenth century there was very little independent law of contract (x). The Roman law of contract in the days of Justinian was also in the same undeveloped state. The modern *doctrine of consideration* which cemented together different forms of action has moulded different branches of the law of contract into one organic whole. So the apparent shortcoming regarding the law of contracts in general is not the peculiarity of the Hindu system alone, but may be ascribed to the scanty volume of trade, commerce and exchange in those times. The Hindu Law of contract on the whole was as much developed as other systems of ancient law.

SECTION 2. DEBTS

"Recovery of Debts" is the first of the eighteen titles of law as mentioned by Manu. The title of recovery of debts consists of seven points. The kind of debt which should *be paid*, the one which *should not be paid*, by what *person* should it be paid, at what particular *time* should it be paid, and in what *way it is to be paid*, in all *five parts* for the debtor, and for the creditor two, *vis.*, the mode of *advancing* the loan and mode of *recovering* it. Here we are not concerned with the mode

(x) Pollock's Law of Contract, p. 135.

of advancing the loan, so we shall consider the question from the other six aspects. The Mitakshara following the text of Narada divides the subject as stated above :

ऋणं देयमदेयं च येन यत्र यथा च यत् ।
दानग्रहणधर्मश्च ऋणादानमिति स्मृतम् ॥

Liability to pay debts is acknowledged to be one of the earliest forms of contractual obligations, corresponding to *mutuum* of Roman Law. It may be of two kinds : (1) secured or (2) unsecured. It is secured when there is a pledge for its satisfaction or when a third person stands as a surety for the debtor, while an unsecured debt is evidenced by a written document or merely supported by witnesses.

Kinds of loan.

Law of attestation. The law regarding attestation लेख्यप्रकरणम् has been laid down by Yajnavalkya (II. 84-90) as under :

Whenever the settled matters between the parties relating to a transaction are reduced to writing, the presence of the parties and witnesses is essential (S 84). The instrument must contain month, day, caste, race (gotra), age and the father's name of the executant (S. 85), and at its end the debtor will have to write that he accepts the terms and the conditions of the said deed as correct and true and must sign and give his father's name (S. 86). The witnesses would then sign and also write that they are the witnesses to the transaction in question and should give their parentage (S. 87). The scribe of the deed shall also sign and write that he is the scribe and should give his parentage (S. 88). The attestation is not essential when the deed is wholly written out by the executant himself provided no undue influence has been exerted on him (S. 89). The number of witnesses cannot be less than three (S. 90) ;

[S denotes Sloka]

यः कश्चिदर्थो निष्णातः स्वरुच्या तु परस्परम् ।
लेख्यं तु साक्षिमत् कार्यं तस्मिन् धनिकपूर्वकम् ॥
समामास तदर्धाहर्नाम जाति स्वगोत्रकैः ।
सब्रह्मचारिकात्मीय पितृ नामादि चिह्नितम् ॥
समाप्तेऽर्थे ऋणी नाम स्वहस्तेन निवेशयेत् ।
मत्तं मेऽमुकपुत्रस्य पदत्रोपरि लेखितम् ॥
साक्षिपश्च स्वहस्तेन पितृनामकपूर्वकम् ।
अत्राहममुकः साक्षी लिखेयुरिति ते समाः ॥
वभयाभ्यर्थितेनैतन्मया ह्यमुकं सुनुना ।
लिखितं ह्यमुकेनेति लेखकोऽन्ते ततो लिखेत ॥

विनापि साक्षिभिर्येयं स्वहस्त लिखितं तु यत् ।
तत्प्रमणं स्मृतं लेख्यं वल्लोपधिकृताद्भूते ॥
ऋणं लेख्यं कृतं देयं पुरुषैस्त्रिभिरेव तु ।

Vrihaspati (II. 1) held that the creditor should advance a loan after having first secured a pledge of adequate value, or a deposit, or a trustworthy surety, entering into a bond, duly attested by witnesses,

Mode of advancing loan.

परिपूर्णं गृहीत्वाधिं बन्धं वा साधुलभ्यकम् ।
लेख्याकृतं साक्षिभिराऋणं दद्याद् धनी सदा ॥

and that no debt should be advanced to women, to slaves, and to minors

नैव स्त्रीदासबालेभ्यः प्रयच्छेत् किञ्चिदुद्धृतम् । (Katyavana)

A debt is made up of two essential elements: (1) receipt of a benefit, and (2) existence of an express or implied promise to repay. The primary source of the idea of obligation pertaining to a debt was the receipt of the benefit which carried with it the duty to repay. Obligations to do certain acts in return for benefits received were ingrained in the idea of a loan. Its satisfaction was a foregone conclusion even without the accompaniment of any promise on the part of the person receiving those benefits to repay the debt. This is illustrated in the Taittiriya Sruti thus:—

Two elements of debt.

"A Brahmana at the moment of his birth becomes indebted in three ways; he discharges his debt to the *gods* by the *performance of sacrifices*, to the *ancestors* by *procreating children* (to continue the line and offer funeral oblations), and to the *sages* (who went before him) by *learning the Vedas*."

जायमानो हि वै ब्राह्मणः त्रिभिर्ऋतैः ऋणवान् जायते ।

ब्रह्मचर्येण ऋषिभ्यो यज्ञेन देवेभ्यः प्रजयापितृभ्यः ।

एष वा अन्तुणो यः पुत्री यज्वा ब्रह्मचारी च ॥ [Sruti]

These were not debts in the legal sense of the term nor were such obligations actually legal obligations, but they showed that the essential element was the receipt of benefit which engendered the idea of a moral obligation to repay. When the benefit was conferred, this moral obligation assumed a legal aspect in the form of an express or implied undertaking to repay. Thus under Hindu Law, a debt arises not only from a loan of money but also from other obligations, prescribed by religion.

A debt often carries with it a liability to pay interest on the amount lent. But our ancient Dharma-shastras severely condemned the practice of taking interest on loans. Vashista says, "Destruction of fetters and extortion

Interest on loan.

of interest were weighed in the balance; whereupon the destroyer of the *foetus* went up on the scale and the usurer fell down."

वृद्धिञ्च भ्रूणहत्याञ्च तुलया समतोलयन् ।

अतिष्ठद् भ्रूणहा कोट्यां वार्द्धिषण्यक् पपातह ॥

The above figuratively expresses that extortion of interest was more reprehensible than the destruction of foetus; but in spite of this strong condemnation, it was not made illegal. Vashista adds, "or let it be paid to that sinner who is lost to all virtuous acts," that is, though not legally forbidden, it was vicious to charge interest on money lent.

कामं वा परिलुप्तकृत्याय पापीयसे दद्यात् ।

Manu (X. 117) disapproves of the practice when it borders on extortion.

ब्राह्मणः क्षत्रियो वापि वृद्धिनैव प्रयोजयेत् ।

कामन्तु खलु धर्म्मार्थं दद्यात् पापीयसे ऽल्पिकां ॥

Narada has classed it as a means of income of a mixed character, partly pure and partly impure, and it is permissible as a legitimate means of earning only for a Vaishya. It, therefore, follows that the charging of interest was allowed only within certain limits.

Our Dharma-shastras mention different kinds of interest; in some cases the rates of interest were fixed by law, in others they were fixed by special contract between the parties. The rates could be either simple or compound. Often the enjoyment of the property pledged was treated as interest. Besides these classes, the rates were also fixed by law which varied according to the risk incurred by the creditor; an unsecured debt carried higher rate than the secured one. It also varied in accordance with the caste of the debtor; one belonging to a higher caste being required to pay a lower rate than another belonging to a lower caste. Persons who had to traverse forests could be charged at 10 per cent; sea-voyagers, at 20 per cent as laid down by Yajnavalkya (II. 38): **कान्तारगास्तु दशकं सामुद्रा विंशकं शतम् ।** The rate of interest could also be fixed by special agreement between the parties but in such a case a rate higher than the rate fixed by law would not be valid unless the debtor expressly agreed in a case of urgency or at a time of distress (Vachaspati cited in Viramitrodaya on Rinadan):

श्रुणिकेन तु या वृद्धिरधिका सम्प्रकल्पिता ।

आपत्काल कृता नित्यं दातव्या सा तु कारिता ।

अन्यथा कारिता वृद्धिर्नदातव्या कथञ्चन ॥

Jagannatha remarks that the mention of the times of distress is only illustrative; so according to this interpretation the interest which

has been promised through compulsion is invalid.

Hindu Law permitted the creditor to charge interest under certain circumstances even in the absence of a definite contract to that effect. Vishnu says that when a debt without interest is not paid within the stipulated time out of avarice, it would carry interest from after the expiry of that period (cited in Viramitrodaya on Rinadan):

यो गृहीत्वा धनं पूर्वं श्वो दास्यामीतिसामकम् ।

न दद्यात् लाभतः पश्चात् तदद्वाहुवृद्धिमामुयात् ॥

When there is no definite period fixed for repayment of debt, the interest at a legal rate would run after six months, according to Narada (I 108), after a year according to Vishnu, and after a previous demand according to Katyayana:

न वृद्धिः प्रीतिदत्तानां स्यादनाकारिता कश्चित् ।

अनाकारितमप्युद्ध्वं वत्सराद्धाद्विवर्द्धते ॥

The difficulty arises only in cases when there is no stipulated time for the payment of debt nor any rate of interest is fixed. Katyayana, in his above mentioned text, says that interest should run on the failure of the debtor to pay on demand whenever that demand may be made. This gives rise to two interpretations, *vis*, that the interest may run only after a previous demand, or on the expiry of the given interval of time. The latter interpretation culled from Mitakshara was followed in *Saunadanappa v. Shivbasawa* (31 Bom. 354) in a Bombay case. It needs no comment to choose one construction or the other, but all this shows the gradual relaxation of the extreme aversion to the practice of taking interest.

Our Dharma-shastras have specifically laid down rules against usury. Vrihaspati (XI. 12) says, "To continue

Usury.

to retain and enjoy the pledge after the double of the principal has been realized from it, to charge compound interest, and to realize the principal along with interest accrued (at the time of returning the pledge),—all this constitutes *usury* and is censured."

भोगो यद् द्विगुणाद्ध्वं चक्रवृद्धिश्च गृह्यते ।

मूलं च सोदयं पश्चात् वार्षिक्यं तद्विगर्हितम् ॥

Manu (VIII. 152) also lays down, "Interest stipulated in contravention of the law is not payable; they declare this to be the usurer's way: it is only 5 per cent to which the creditor is entitled "

कृतानुसारदधिका व्यतिरिक्ता न सिद्ध्यति ।

कुसीदपथमाहुस्तं पञ्चकं शतमर्हति ॥

These texts show how an attempt was made to prevent extortionate and unconscionable bargains from being made. The rate

of interest was limited to a reasonable figure except under special circumstances, but in case of loans in cash, Hindu Law went further and prescribed a maximum beyond which interest recoverable at a particular date could not exceed twice the amount of the principal, as laid down by Manu (VIII. 151) :

कुसीदवृद्धिद्वैगुण्यनात्येतिसकृदाहता ।

The accumulation of interest was in no way allowed to exceed the principal. The creditor could, however, realise smaller sums as interest and in this way he could realise more than the principal as interest. But with regard to other objects of loan, different limitations were prescribed.

Law of Damdupat.

Exception to the above maxima.

'On substances from which spirituous liquor is extracted, on cotton, yarns, leather, weapons, bricks and charcoal, the interest never ceases' (Vishnu VI 16 quoted in Viramitrodaya 300).

किस्वकार्पाससूत्रवर्मचर्मायुषेष्टकाङ्गाराणामन्या ।

On the tender of payment of loan, interest would cease to run, but the tender must be kept good by the debtor by depositing the money with a third person in case the creditor refuses to accept it. Viramitrodaya—

Tender stops the running of interest.

तथा च याज्ञवल्कः—दोयमानं न गृह्णाति प्रयुक्तं यत्स्वकं धनं ।

मभ्यस्थ स्थापितं तत् स्यात् वर्धते न ततः परं ॥

मभ्यस्थ स्थापितमिति विशेषणैनाधर्मणो यदि स्वनिकटे स्थापयति तदा भवत्येववृद्धिरिति वीरमित्रोदयः

In some cases of the Calcutta High Court (a) the judges referred to a number of English and American rulings to establish this point but failed to refer to this rule of Hindu Law.

Debts could be recovered in two ways: (1) by recourse to litigation, and (2) without recourse to litigation.

Recovery of debts.

प्रपन्नं साधयन्नर्थं न वाक्यो नृपतेर्भवेत् ।

साध्यमानो नृप गच्छन् दण्डोदाप्यन्नतद्धनं ॥ [Ya] II. 40.]

The former will be discussed while dealing with adjective law. There is nothing peculiar about it as the creditor has to prove his debt before the court and the decree is enforceable through the agency of the king's officers. Manu has laid down the rule (VIII. 49) : "By *dharna* (the use of inoffensive persuasion or mediation of friends), by suit in court, by artful management, or by distress, a creditor may

(a) *Jagat Tsaini Dasi v. Nabagopal Chakr* 34 Cal. 305; *Kripasindhu Mukherjee v. Annadasundari Deb* 35 Cal. 34.

recover the property lent and, fifthly, by force."

धर्मेण व्यवहारेण कुलेनाचरितेन च ।

प्रयुक्तं साधयेदर्थं पञ्चमेन वलेन च ॥

Dr. P. N. Sen has very nicely given the law in these words, "Besides litigation, four other means of obtaining satisfaction of a debt are mentioned by Manu ; these extra-judicial methods involve varying degrees of pressure exercised upon the debtor in order to induce him to pay off the debt ; thus in the first which was called '*dharna*,' reliance was placed upon moral persuasion or intervention of friends involving the minimum of external compulsion ; in what was called artful management **कुल**, the creditor had recourse to a little bit of stratagem to get back what was lent by him, as for example where with an artful design he borrowed a thing of his debtor or withheld a thing deposited by him and thus compelled payment of the debt ; a case like this occupied an intermediate position between mere moral persuasion and forcible coercion to repay the debt ; the third method of recovering a debt without litigation was what has been called **आचरित** and this has been explained by some to mean distress of the chattel belonging to the debtor and by others to signify constant attendance at the house of the debtor without taking any food until the debtor gets rid of the vexation by paying off the debt or, in other words, what is known in common parlance as sitting '*Dharna*' at the door of the debtor ; that last of these measures was the use of force, as for instance, the forcible confinement of the debtor or the like with a view to enforce the payment of the debt. The enumeration of these private or extra-judicial methods of obtaining the repayment of a loan in connection with positive law seems to signify no more than this, that if in a proper case the creditor employs any of these means for the recovery of his debt, he is not to be prohibited or punished by the king ; on the other hand, Yajnavalkya (II. 40) says that if the debtor being so treated in a just cause complains to the king, he shall not only obtain no relief, but shall also be made to pay off the debt and be even fined for lodging an improper complaint.

प्रपन्नं साध्यन्नर्थं न वाक्यो नृपतेर्मवेत् ।

साध्यमानो नृपंगच्छन् दण्डयोदाप्यश्नतद्धनं ॥

The law, therefore, sanctions these private methods of enforcing payment of a debt without recourse to litigation, but then, there is this important reservation which must not be lost sight of, *viz.*, that the creditor must not take the law into his own hands if the debtor does

not admit the creditor's claim, or disputes its amount or character, or, in any way demands a trial by court, for in these predicaments, it becomes the duty of the creditor to go to court, obtain its decision, and secure satisfaction through it. A creditor who under such circumstances uses force to compel the debtor to pay, becomes liable to punishment and also loses the debt (Katyayana cited in Mayukha on Rinadan) :

पीडयेत्तु धनी यत्रऋणिकं न्यायवादिनम् ।

तस्मादप्यात् स द्वियेत तत्समंचाम्प्रायाद्धनं ॥

for the same law that sanctions the use of force under certain circumstances when the debtor does not dispute the creditor's claim and insists upon judicial determination, also lays down that litigation must be resorted to when the debtor demands the same; but in order to discourage fruitless appeal to litigation it provides that if a debtor compels the creditor to sue by raising false pleas and claiming judicial determination by court knowing that there is no real defence, he should be ordered not only to satisfy the debt established by evidence before the court, but also to pay a penalty imposed with reference to his capacity for unnecessarily dragging the matter into court." (Manu VIII. 51) :

अर्थेऽपव्ययमानन्तु करणेन विभावितं ।

दापयेद्धनिकस्यार्थं दण्डलेशञ्च शक्तिः ॥

These extra-judicial methods of obtaining the satisfaction of a debt have their parallel in other systems of law as well. The fate of an insolvent debtor under the twelve tables is well-known as there was a provision that the several creditors could cut off the debtor's body and divide it among themselves as if they were so many cannibals. Besides this, two other methods of levying execution against a judgment-debtor, *v. s.*, *manus injectio* and *pignoris capio* by which the person or the property of the judgment-debtor could be seized by the creditor as a pledge for the satisfaction of the debt, were prevalent in Roman Law; with the growth of the power of courts, they took the form of judicial seizure and unjust and unnecessary violence was checked by them. Under the Hindu Law, the powers of the creditor were hedged in with good many limitations and afforded sufficient protection to the debtor.

Hindu Law never intended to lay down that any force was to be used upon the debtor by way of punishment for his failure to pay up the debt, so when it was found that the debtor was unable to pay it, he was made to square it by performing services for the creditor suited to his capacity if

**Satisfaction
of loan by serv-
ing the creditor.**

he did not belong to a high caste ; as has been explained by Katyayana :

• धनदानासहं बुद्ध्वा स्वाधीनं कर्म कारयेत् ।

अशक्तौ बन्धनागारे प्रवेश्यो ब्राह्मणादूते ॥

Then it was also laid down by the great sage that if a creditor without applying to the king were to make his debtor perform degrading work, he should be punished with fine, and the debtor absolved from liability.

यदि ह्यादावनादिष्टमशुभं कर्म कारयेत् ।

प्राप्नुयात् साहसं पूर्वाश्रयान् मुच्येत चर्षिकः ॥

When he was unable to pay his debts all at once by reason of **Payment by instalment.** poverty, it was declared that he should be allowed to pay by instalments (Narada I. 161)

अशक्तिविहीनः स्याद्वृणी कालविपर्ययात् ।

शक्तपेक्ष्यमृणन्दाप्यः काले काले यथोदयं ॥

In case of serious loss of interest, the creditor was allowed to get his bond renewed. Under the Hindu Law the duty of the debtor to pay off the loan was absolute. In case of the death of the creditor, it was to be repaid to his heirs and in their absence or when they could not be found, the debt was to be paid to a Brahmana or the amount was to be thrown into water:—

यदा तु न सकुल्याःस्युर्न च सम्बन्धिवाम्भवाः ।

तदा दद्यात् द्विजेभ्यस्तु तेष्वसत्स्वप्सु निक्षिपेत् ॥ [Narada.]

It shows that the absence of the creditor's heirs would not absolve the debtor from his liability to pay.

The son of a debtor lies under an obligation to pay the debts incurred by the father, when the latter is dead or otherwise incapable to pay them himself; even when he has got no assets from his father he is to clear off the father's debt with interest that may be due. But in the case of a grandson when there are no assets, he need not pay more than the principal, the great-grandson need not pay anything unless of course he is in possession of the assets of his great-grand father who contracted the debt. But a debt incurred for

Exception. immoral purpose is not binding on the son or any other heir, as Vrihaspati says: " The son is not compellable to pay sums due by his father for spirituous liquors, for losses at play, for promises made to unrighteous persons without consideration, or under

the influence of lust or wrath or sums for which he was liable as a surety, or a fine, or a toll, or the balance of either."

सौराक्षिकं वृथादानं कामक्रोधप्रतिधुतं ।
प्रातिभाष्यं दण्डशुल्कशेषं पुत्रो नदापयेत् ॥

In some of these cases, such as for a promise made to an unrighteous person without any legal or moral consideration, even the debtor himself is not legally liable. In the case of a fine or suretyship for the appearance of another, the liability is of such a character that it dies with the person's death; so the liability does not descend to the son; and in the case of debts for wine or women, the immoral character of the debt saves the son from all liability. The principle underlying these exceptions appears to be that the claim of the creditor is so devoid of merits as to have no moral force to support it, or when it is based on entirely personal grounds or is tainted with immorality, the law does not cast any liability on the son to repay the debt.

The duty to pay off the father's debt is to be postponed till the son attains majority.

नाप्राप्तव्यवहारेण पितर्युपरते कचिद् ।
काले तु विधिना देयं वसेयुर्नरकेऽन्यथा ॥ [Katyayana cited in Viramitrodaya.]

This rule though inconvenient to the creditor was intended to save many families from utter ruin.

Failing the heirs, a person who *takes* the widow of the deceased debtor has been declared liable to discharge the debt (Yajñavalkya II. 51).

रिक्थग्राहकृणं दाप्यो योषिद् ग्राहस्तथैव च ।
पुत्रोऽन्यन्याश्रितद्रव्यः पुत्रहीनस्य रिक्थिनः ॥

Vrihaspati has laid down that a person should pay his father's debts which he is liable to pay, prior to his own and his grand-father's debts even before those of his father.

**Order of the
payment
debts.**

पित्र्यं पूर्वमृणं देयं पश्चादात्मोयमेव च ।
तयोः पैतामहं पूर्वदेयमेवं ऋणं सदा ॥

As regards his own debts, they should be paid in the order contracted subject to the first payment to a Brahmana and next to the king in preference to other debts irrespective of their position in point of time

शुद्धीतानुक्रमाद् दाप्यो धनिनामधमर्णिकः ।

एत्वा तु ब्राह्मणायैव नृपतेस्तदनन्तरम् ॥ [Yajñavalkya II. 41.]

If a creditor can find out any particular article which was purchased from the money lent, he will have a preferential charge over that article towards payment of his debt (Katyayana) :

यस्य द्रव्येण यत्पण्यं साधितं यो विभावयेत् ।

तद्रव्यमृणिकेनैव दातव्यं तस्य नान्यथा ॥

These provisions of Hindu Law with respect to the law of debts show that they were neither unduly hard upon debtors nor unnecessarily indulgent to creditors and the restrictions on excessive usury were quite desirable to suit the needs of the country.

Let us carefully note that under Hindu Law moral obligations take preference over legal ones. The liability of one person to pay debts contracted by another arises from three completely different obligations :

(1) The religious duty of discharging the debtor from the sin of his debt. This only arises in the case of a debtor and his sons. In Hindu Law a debt is not only an obligation but a sin, the consequences of which follow the debtor in the next world. As Katyayana observes :

उद्धारादिकमादाय स्वामिने न ददाति यः ।

स तस्य दासो भूत्यः स्त्री पशुर्वा जायते गृहे ॥

The duty of relieving the debtor from evil consequences falls on sons and was originally independent of their receiving the assets of the deceased father.

(2) The moral duty of paying a debt contracted by one whose assets have passed into the possession of another.

(3) The legal duty of paying the debt contracted by one person as the agent of another.

Persons liable for the debt.

The following persons as enumerated by Yajnavalkya should pay the debt :

- (1) He who has received the estate of the deceased.
- (2) He who has taken the wife of the deceased.
- (3) Even the son who has not received the inheritance.
- (4) If the deceased is sonless, those who take the heritage.

रक्षग्राहकणं दाप्यो योषिदग्राहस्तथैव च ।

पुत्रोऽनन्याश्रित द्रव्यः पुत्रहीनस्य रक्षितः ॥

(5) In the case of joint family Narada observes that a debt contracted for family before partition by father's brother or mother shall be paid by all coparceners :

पितृव्येणाविभक्तेन भ्रात्रा वा यद्वणं कृतम् ।

मात्रा वा यत् कुटुम्बार्थं दधुस्तद्विक्थिनोऽक्षितम् ॥

(6) A *Husband*, if he is a herdsman, mistri, washermans and *nat* shall pay the debt contracted by his wife because his livelihood depended upon her.

गोपशौम्भिकशैलुषरजकव्याधयोषिताम् ।

ऋणं दद्यात् पतिस्तासां येस्माद्वृत्तिस्तदाश्रया ॥

(7) A wife if she contracted the debt along with the husband or if she is expressly commanded by the husband to pay.

Debts payable to whom.

The following are the persons to whom the debt should be paid in the order given :

(1) *The creditor.*

(2) If he be dead and sonless, *his heirs* who succeed to him, such as wife, daughter, *etc.*

(3) Narada adds that if the descendants do not exist to Sakulyas,

(4) In their absence to bandhavas.

(5) If none from the above classes are in existence to a Brahmana.

(6) And in their absence it should be *thrown into water.*

The debt was always to be paid in kind, and as commanded by Narada it was to be paid in the following manner

द्विरण्यधाम्यवस्त्राणां वृद्धिद्वित्रिचतुर्गुणाः ॥

The maximum increase allowed of gold, grain, and cloth, is double, treble and four-fold respectively. According to **Interest permitted by the Smritis.** Vihaspati the maximum increase allowed of gold is double, on clothes and brass metals treble, on grain quadruple and so also on eatables, vegetable products, beasts of burden, wool or hair. Though no fixed rules seem to exist yet it can be stated with reasonable certainty that the rate of interest was calculated by day, month or year. An eightieth part of (the principal) is the monthly interest when a pledge has been delivered ; otherwise it may be 2, 3, 4 or 5 per cent. The debtor was at liberty to pay the debt and interest at any time and if the creditor refused to accept, he lost his right of interest. But it was a settled rule that in case of such objects as gold *etc.*, when once the maximum was reached (**द्विरण्य ... चतुर्गुणाः**) interest at once ceased. As observed by Gautama **चिरस्थानं द्वेगुण्यम्** 'if the loan remains outstanding for a long time the principal may be doubled (in case of gold) after which the interest ceases.'

SECTION 3. PARTNERSHIP

The Hindu jurists treat partnership under the heading **सम्भूयसमुत्पन्नं** which means an undertaking by a group of people working together.

When traders or others jointly carry on business it is called a concern among partners. As Naiada observes:—

वणिक् प्रभृतयः यत्र कर्म संभूय कुर्वन्ते ।

तत्संभूय समुत्थानं व्यवहार पदं स्मृतम् ॥

The Mitakshara defines a partnership or समवाय as सर्वे वयमदि कर्म मिलिताः कुर्म इति एवं रूपा संप्रतिपत्तिः, i.e., the agreements of people, such as traders, actors, dancers and the like working together with a view to gain लाभे लिप्सवः

Vajnavalkya has declared that the share of a partner in the profits or losses of the partnership business depends either upon the amount of capital supplied by him or upon the terms of the agreement under which the partnership was created

Rights and obligations of partners.

समवायेन वणिजां लाभार्थं कर्म कुर्वन्तां ।

लाभालाभौयथाद्रव्यं यथा वा संविदाकृतौ ॥

One partner could act for all by the general consensus and then his act and deeds would have the binding effect on others, as if they were the acts and deeds of all the partners.

In case of accidental loss of the partnership goods, the loss would be borne by the partners in accordance with their shares; but when the loss was due to the negligence of one of the partners or owing to his ignoring the warning of other partners, it was to be borne by him alone.

अनिर्दिष्टो कार्य्यमाणः प्रमादाद् यस्तुनाशयेत् ।

तेनैव तद्भवेद्देयं सर्वेषां समवायिनां ॥

So if any loss is occasioned by a partner doing what was forbidden or not sanctioned, or through his negligence, he should make good the loss:

प्रतिबिद्धमनादिष्टं प्रमादात् यच्च नाशितम् ।

स तद् दद्यात् विस्रवात् च रक्षितात् दशमांशमाक् ॥

[Yaj. II, 26a]

On the contrary, if a partner saved goods from accidents by his additional work or caution he should be paid something extra. In cases of a work or business which was incidental to the partnership business and which had to be done by all together, one who refused to join had to bear the loss incurred.

If any of the partners is honestly unable to do his share of the

work in the concern, he should have it done by somebody else as his substitute (Yaj. II. 265).

जिह्मं त्यजेत्पुर्नित्ताभिमशकोऽन्येन कारयेत् ।

अनेन विधिराख्याय ऋत्विक्कर्षककर्मिणाम् ॥

When a number of tradesmen carry on business jointly for the purpose of making profits, the profit or loss of each shall be in proportion to the capital contributed by each.

Or, this question may be determined as agreed upon among themselves.

These two principles are evident from the following texts of Yajnavalkya :

समवायेन वणिजां लाभार्थं कर्म कुर्वताम् ।

लाभालाभौ यद्यद्रव्यं यथा वा संविदा कृतौ ॥

[II. 259.]

A partner must do that which he is entitled to do, and must not do that which is forbidden or disapproved by others or that which is injurious to the partnership (common) property. If he is negligent, he must make good the loss.

But if any partner preserves or protects the property from the robber or from any other calamity, he is entitled to the tenth part by way of reward, as Yajnavalkya observes :

प्रतिषिद्धमनादिष्टं प्रमादाद्यच्च नाशितम् ।

स तद् दद्यात् विल्लाच्च रक्षिताद् दशमांशमाक् ॥

[II. 260.]

A partner must act fairly and diligently in the business of partnership and must not act crookedly. A partner of crooked ways shall be expelled by the partners without paying him any profits ; **जिह्मं त्यजेयुः नित्ताभं** any partner who by reason of some cause or otherwise is unable to attend to the business of partnership or act in that behalf, may appoint another man to act for him. **अशकोऽन्येन कारयेत्**

The provisions laid down above apply equally to (i) sacrificers, (ii) agriculturists, and (iii) artisans.

According to later Smritis of Narada, Vrihaspati and Katayana, in the absence of any contract to the contrary, partnership profits between an apprentice, comrade, expert and master in craft shall be divided in the proportion of 1-2-3-4, i.e., exactly in proportion as laid down by Manu (VIII. 210) for sacrificial priests.

सर्वेषामर्द्धिनो मुख्याः तदर्धेनार्थिनोऽपरे ।

तृतीयिनः तृतीयांशाश्चतुर्थ्यांशाश्च पादिनः ॥

As Katayana observes :—

शिष्यकार्यकुशलाचार्याश्चेति शिल्पिनः ।
एकद्वित्रिश्चतुर्भागान् हरेयुस्ते यथोत्तरम् ॥

The above provisions for division of profits or spoils apply to priests and robbers as well

Special rule of succession. The wealth of partner dying abroad shall be taken by his (a) heirs (b) bandhavas, (c) kinsmen, (d) his co-partners, (e) failing these, by the king.

देशान्तरगते प्रेते द्रव्यं दायाद् बान्धवाः ।

ज्ञातयो वा हरेयुस्तदागतास्तैर्विना नृपः ॥

[Yaj. II. 464.]

The Mitakshara has explained the above text thus : The wealth of a merchant dying abroad can be inherited by sons, bandhavas, kinsmen and failing all these by the king.

पुत्रादि अपत्य वर्गः बन्धवो मातृपक्षा मातुलायाः ॥ ज्ञातयो *i. e.* अपत्य-
वर्गाश्च रिक्तः सपिण्डः ॥ आगताः *i. e.* सम्भूय व्यवहारिणो ये देशान्त-
रादागताः ।

The devolution of a merchant's business is, therefore, subject to special rules according to which succession takes place.

The punishment for fixing one's own price when the same has been determined by the king before, is a fine of the
Penalties. twentieth part of the price so fixed to be paid to the king as tax, while for dealing in articles prohibited by the king or for dealing in such articles as jewels, rubies and the like which are worthy of the king the penalty consists in the appropriation of the articles by the king (Yaj. II. 261 with Mitaskhara). The penalty for declaring false weights or for avoiding toll is eight times the sum and the same is for fraudulent purchases or sales. (Yaj. II. 263)

Partnership among priests. The rules regarding partnership among priests jointly officiating at holy rites are as follows:—

Narada—"Should a priest officiating at holy rites be disabled, let another in like manner perform his work, and receive from him the stipulated share of the gratuity."

Vrihaspati—"So if one of several persons, jointly engaged in sacrificing, or other work should be disabled from acting in it, let his part of it be performed by a kinsman or by all the other associates."

Yajnavalkya—"A man of crooked ways let the other partners expel without profit; and let partner unable to act appoint another man to act for him: this law is declared among priests who jointly officiate at holy rites and among husbands men or artificers."

Manu—"If an officiating priest, actually engaged in a sacrifice, abandon his work, a share only in proportion to work done shall be given to him by his partners in the business, out of their common pay."

—"The sacrificer who forsakes the officiating priest, and the officiating priest who abandons the sacrificer, each being able to do his work and guilty of no grievous offence, must each be fined a hundred *panas*."

—"The distribution of gratuity will take place thus amongst the four grades of priests each consisting of four—the first class of the officiating priest shall take half and the subsequent three grades $\frac{1}{4}$, $\frac{1}{4}$ and $\frac{1}{4}$ of the first-class."

सर्वेषामर्चिनो सुव्यास्तदर्धेनार्चिनोऽपरे ।

तृतीयिन्स्तृतीयांशाश्चतुर्थांशाश्च पादिनः ॥

[Manu VIII, 210.]

SECTION 4. SURETYSHIP

A debt was generally advanced in two ways (1) by giving a pledge, and (2) by furnishing a surety. Different kinds of sureties have been mentioned by our sages Yajnavalkya (II. 53)

Different kinds of sureties.

says, "suretyship is (1) for appearance, (2) for trust and (3) for payment." दर्शने प्रत्ययेदाने प्रातिभाष्यं

विधीयते ।

The Mitakshara after defining suretyship प्रातिभाष्यं as विश्वासार्यं पुरुषान्तेण सह समयः a contract with another person with the object of creating confidence, describes the three kinds mentioned by Yajnavalkya as follows:—

दर्शने दर्शनापक्षेप एनं दर्शयिष्यामीति । a surety for appearance with the words "I shall produce him wherever his appearance is necessary".

By way of assurance, *vis*, lend him money upon my assurance, he will not deceive you. Since he is the son of such and such a person, or he possesses a very fertile land, or possesses an excellent village.

दाने प्राप्यं न दद्याति तदानीमहमेव दास्यामीति प्रातिभाष्यं विधीयत इति for payment "if he does not pay then I shall myself pay". This sort of surety marked an intermediate stage between a pledge accompanied by delivery of possession and a mere hypothecation.

But according to Vrihaspati "the surety is of four kinds— (1) for appearance, (2) for trust, (3) for payment and (4) for delivering the assets of the debtor." दर्शने प्रत्यये दाने ऋणिद्रव्यार्पणे तथा । चतुष्प्रकारः प्रतिभूः ॥ There is very little difference between the last two ; in the former the surety promises to pay off the debt himself if the debtor fails to do so, while in the latter he undertakes to produce the assets of the debtor for the satisfaction of his debt in case it is not paid by him. (1) The surety for appearance undertakes to 'produce the debtor when required'; (2) the surety for trust guarantees that 'the debtor is a respectable person'; (3) the surety for payment undertakes to 'pay the debt,' and (4) the surety for delivering the assets undertakes to 'deliver the assets of the debtor.'

आहैको दर्शयामीति, साधुरेवोऽपरोऽब्रवीत् ।

दाताऽहमेतद्द्रविणम्, अर्पयाम्यपरो वदेत् ॥

Harita mentions five kinds of sureties :

(1) for fearlessness, (2) for trust (3) for payment, (4) for appearance and (5) for delivering the assets :

अभये प्रत्यये दाने उपस्थानेऽर्थदर्शने ।

पञ्चस्वेषु प्रकारेषु ग्राह्यो हि प्रतिभूबुधैः ॥

There is another kind of surety, *viz.*, one for safety or one who undertakes to keep one out of fear, exactly corresponding to that class of sureties which a man may be called upon to furnish under the present Criminal Procedure Code, *e.g.*, sureties to keep the peace, or for good behaviour.

Liability of son and grandson for suretyship debts.

The son's liability in respect of father's obligation as a surety may now be considered :—

प्रातिभाज्यं नाम विश्वासार्थं पुरुषान्तरेण सह समयः

Sureties of this nature are of three kinds :

(a) for appearance (दर्शने) दर्शने प्रत्यये दाने प्रातिभाज्यम्

(b) for honesty (प्रत्यये) निश्चयमेते

(c) for payment (दाने) आदौ तु विनये दाप्या पितरस्य सुता अपि

(i) In the case of (a) and (b) the sureties alone shall be held responsible in the case of default of the person for whom they have offered themselves as sureties, the liability shall not extend to the sons ;

(ii) but in the case of a surety for payment, the liability shall extend to the sons also.

Thus commenting on the text of Yajnavalkya, आदौ तु विनये दाप्या पितरस्य सुता अपि Vijnaneshwara says : आदौ तु दर्शनं प्रत्ययं प्रतिभूतौ । विनये अन्यथा भावे अदर्शने विश्वास व्यभिचारे च । दाप्यौ राज्ञा प्रस्तुतं धनमुत्तमर्णस्य । इतरस्य तु दानं प्रतिभुवः सुताः अपि दाप्याः ॥ He states that even in the case of a surety for payment, the liability extends to the son but not to the grandson. सुता इति वदता न पौत्रा दाप्या इति दर्शितम् ॥

(iii) Therefore, even in the case of surety for payment the liability will extend only to the son but not to the grandson.

In support of this rule, while commenting on the following verse of Yajnavalkya (II. 54) :

दर्शनप्रतिभूर्यत्र मृतप्रात्यायि कोऽपिवा ।

न तत्पुत्रा ऋणं दद्युर्दद्युर्दानाय यः स्थितः ॥

Vijnaneshwara quotes the following text of Vyas :

ऋणं पैतामहं पौत्राः प्रातिभाव्या गते सुतः ।

समं दद्यात्सुतौ तु न दाप्याविति निश्चयः ॥

In short, ordinarily a grandson shall pay without interest the debt of his grandfather and so shall a son the debt of suretyship by his father. With respect to the debt of the latter kind (*vis.*, of suretyship) grandson and great-grandson should not be made to pay.

यत्र दर्शनं प्रतिभूः प्रत्ययं प्रतिभूवा बन्धकं पर्याप्तं गृहीत्वा प्रतिभुञ्जान-स्तत्र तत्पुत्रा अपि तस्मादेव बन्धकात् प्रातिभाव्याय तमृणं दद्युरेव ।

The above provisions apply only when the suretyship is entered into *without the receipt of wealth* and not otherwise : for Katyayana observes :

गृहीत्वा बन्धकं यत्र दर्शनेऽस्य स्थितो भवेत् । विना पित्रा धनात्तस्मात् दाप्यः स्याद्गृणं सुतः ॥

As regards the surety for production of the assets of the debtor, Viramitrodaya says that there is not much difference between this surety and surety for payment, so it will not be unreasonable to infer that the same rule should apply to both the cases.

यत्तु योगीश्वरेण प्रतिभुवस्त्रैविध्यमुक्तं, दर्शने प्रत्यये, दाने, प्रातिभाव्यं विधीयते । तद्दानार्पणयोर्जननि भेदाभिप्रायेण । इति ।

[Viramitrodaya]

Vrihaspati clearly says that the liability does not extend to the son in the cases of sureties for appearance or for confidence, but it does so extend, if a default takes place, in the other two cases, *vis.*, when the surety had undertaken either to pay off the debt or to produce

the goods of the debtor (cited in Viramitrodaya on *Pratibhu*):

आद्यौ तु वितथे दाप्यौ तत्कालावेदितं धनं ।

उत्तरौतु विसम्वादे तौ विना तत्सुतौ तथा ॥

Even in such cases, the son will be liable for the principal only and not the interest and the grandson is not liable at all.

प्रातिभाव्यागतं पौत्रैर्दातव्यं नतु तत् कश्चित् ।

पुत्रेणापि समं देयं ऋणं सर्वत्र पौत्रिकम् ॥ [Katyayana cited in the same.]

ऋणं पैतामहं पौत्रः प्रातिभाव्यागतं सुतः ।

समदद्यात् तत्सुतौ तु न दाप्याविति निश्चयः ॥ [Vyasa cited in the same.]

But in cases when a surety obtains a pledge, the creditor is entitled to get his claim, including interest, satisfied out of the pledge after surety's death.

गृहीत्वा बन्धकं यत्र दर्शनेऽस्यस्थिता भवेत् ।

विना पित्रा धनात्तस्मादाप्यः स्यात्तद्वृणं सुतः ॥

Enforcement of claim against sureties.

Vrihaspati has laid down that the sureties should not be oppressed but should be helped to discharge their liability with ease.

नात्यन्तं पीडनीयाः स्युः ऋणं दाप्याः शनैः शनैः ।

When there are more sureties than one, they shall pay the debt proportionately, but when they are bound severally, the payment shall be made as the creditor pleases.

वहवः स्युर्यदि स्वांशैर्दधुः प्रतिभुवोधनम् ।

एकच्छायाश्रितेष्वेषु धनिकस्य यथारुचि ॥

[Yaj., II, 55]

Commenting on the text as it is, Vijnaneshavara adds that when sureties are severally liable and if one of them be absent in a foreign country then his son may be made to pay the whole by the creditor, but if he be dead, then his son shall pay according to his father's share. He also quotes the text of Katyayana to support his view :

एकदायां प्रविष्टार्हं दाप्यो यस्तत्र दृश्यते ।

प्रोषिते तत्सुतः सर्वं पित्रं शंतु मृते समम् ॥

Remedy of the surety against the debtor.

The surety has a right to recover from the debtor the amount that he pays to the creditor.

यस्यार्थे येन यद्वत्तं विधिनाभ्यर्थितेनतु ।

साक्षिभिर्भाविते नैव अतिभूतस्तत् समाप्नुयात् ॥

Narada (I. 121) has laid down that he becomes entitled to recover from the debtor twice the amount that he has paid to the creditor which

is a sort of compensation for his loss owing to the debtor's default.

यज्ञवार्थं प्रतिभूद्द्याद् धनिकेनोपवीडितः ।

ऋणिकस्तं प्रतिभुवे द्विगुणं प्रतिदापयेत् ॥

Yajnavalkya also supports this view and says:

प्रतिभूदापितो यत्तु प्रकाशं धनिनां धनम् ।

द्विगुणं प्रतिदातव्यमृणिकैस्तस्य तद्भवेत् ॥

[II. 56]

We can thus deduce the rule that if the surety has been made to pay a debt to the creditor, the debtor shall be forced to repay double the amount paid by the surety. Vijnaneshvara states that the surety must have been compelled to pay the debt to the creditor स्वयमपेत्य दत्तम्, and must not have paid it voluntarily out of greed to get the double amount न पुनर्द्वैगुण्य लोभने, and this right of the surety to exact double amount and the obligation of the debtor to repay the double applies only in the case of gold हिरण्य.

But in some cases the liability of the debtor to repay the surety where he has been compelled to pay is not two-fold but goes up to eight-fold :

संततिःस्त्रीपशुष्वेव धान्यं त्रिगुणमेव च ।

वस्त्रं चतुर्गुणं प्रोक्तं रसश्चाष्टगुणस्तथा ॥

[Yaj. II. 57]

As Yajnavalkya also observes :

भ्रातृकाणामथ दम्पत्योः पितुः पुत्रस्य चैव हि ।

प्रातिभाव्यमृणं साक्ष्यमविभक्ते न तु स्मृतम् ॥

Other relevant texts on suretyship law are as follows :—

दर्शने प्रत्यये दाने प्रातिभाष्यं विधीयते ।

आद्यौ तु वितये दाप्यावितरस्य सुता अपि ॥

[Yaj. II. 253]

दर्शने प्रत्यये दाने ऋणि द्रव्यापणो तथा ।

चतुष्प्रकारः प्रतिभूः ॥

[Vrihaspati.]

आहैको दर्शयामीति साधुरेषोऽपरोऽब्रवीत् ।

दाताऽहमेतद् द्रविणं अर्पयाम्यपरोऽब्रवीत् ॥

[Vrihaspati.]

यो यस्य प्रतिभूस्तिष्ठेत् दर्शनायेह मानवः ।

अदर्शयन् स तं तस्य प्रयच्छेत् स्वधनात् ऋणं ॥

[Manu VIII, 238]

SECTION 5. AGENCY

The law relating to agency laid down by Narada is that if a person employs another as an agent in an undertaking, whatever is done by the latter shall be binding on the former.

बिसृष्टार्थस्तु यो यस्मिंस्तस्मिन्नर्थे प्रभुस्तु सः ।

तद्भर्त्ता तत्कृतं कार्यं नान्यथा कर्तुमर्हति ॥

Vilhaspati adds that the act of the agent whether it leads to profit or loss, expenditure or income, must be accepted by the principal as binding, and he must not quarrel about it whether in or outside the country.

प्रमाणं तत्कृतं सङ्घं लाभालाभं व्ययोदयं ।

स्वदेशो वा विदेशो वा स्वामीतत्रविसंवदेत् ॥

Agency for the purpose of representation in law suits has also been recognised :—

यो न भ्राता न च पिता न पुत्रो न नियोगकृत् ।

परार्थवादी दण्ड्यः स्यात् व्यवहारेषु विप्रवन् ॥

Apart from the text relating to the appearance (in court) by agent, Narada broadly states that arguments or works done by one's agent are binding on the principal and they will be treated as his acts :—

अर्थिनो संनियुक्तो वा प्रत्यर्थं प्रेरितेऽपि वा ।

यो यस्यार्थं विवदतेतयोज्यपराजयौ ॥

Manu (VIII. 167) has also said that even dependant members may, when circumstances so require, enter into transactions to meet the needs of the family, which it will be the duty of the head of the family not to disturb, although he may not have previously authorised them so to do.

कुटुम्बार्थेऽभ्यधीनोऽपि व्यवहारं यमाचरेत् ।

स्वदेशे वा विदेशे वा तं स्वामी न विचालयेत् ॥

This is called the agency of necessity which is to be ratified by the head of the family. Katyayana also supports the above view :

अप्रगल्भजडोन्मत्तवृद्धस्त्रीवालरोगिणम् ।

पूर्वोत्तरे वदेत् बन्धुः नियुक्तोऽन्योऽथवा नरः ॥

SECTION 6. NON-PAYMENT OF WAGES

Non-payment of wages which is also one of the topics of litigation, includes contracts of service and letting of goods and articles on hire. The price or consideration for services is called wages वेतन or वृत्ति, but for letting a thing, it is known as भाटक or स्तोम ।

Narada (VI. 2) has observed that wages depend upon contract and

have to be paid before, in the middle of, or after the work, as may be agreed upon.

भृत्यायवेतनं दद्यात् कर्म स्वामी यथा कर्म ।

आदौ मध्येऽवसाने तु कर्मणो यदि निश्चितं ॥

When the contract between the employer and employee is silent as to wages, the remuneration will be according to the nature of the work. If the employee does not carry out the instructions of his master, and thereby some loss is caused, he shall not be entitled to get his wages in full, but only as much as the master thinks it fit to give; but if more profits accrue owing to his superior knowledge or skill in carrying out his work, then his employer should give him something in addition to the fixed wages by way of reward, notwithstanding his omission to follow the prescribed instructions (Yajñavalkya II. 195) :

देशं कालञ्च योऽस्तीयात्स्नाभं कुर्याच्च योऽन्यथा ।

तत्र स्यात्स्वामिनश्छन्दोऽधिकं देयंकृतेऽधिके ॥

When several persons being employed for the same work fail to complete it owing to illness of some or on account of some other unavoidable cause, the wages would be apportioned according to the work done by each which would be decided by an arbitrator. In case an employee falls ill before the work is completed, he shall complete it after he recovers, and in such a case no deduction will be made in the settled wages owing to the delay in its completion, but when the work is not completed in spite of his being in health he will not be entitled to claim even a part of the wages (Manu VIII. 217) :

यथोक्तमार्तः स्वस्थो वा यस्तत् कर्म न कारयेत् ।

त तस्य वेतनं देयं श्रद्धोनास्यापि कर्मणः ॥

In the same way when a person leaves his work before the expiry of the stipulated period, he shall not get any portion of his wages unless he can show that he left the service owing to the fault of the employer, such as the use of abusive language towards the employee without any fault on the latter's part (Narada cited in Viramitrodaya):

कालेऽपूर्णे त्यजन् कर्म भृतेर्नाशमवाप्नुयात् ।

When an employee leaves service owing to his employer's fault he can claim remuneration *quantum meruit* in proportion to the work done (Narada cited in Viramitrodaya):

स्वामिदोषादपक्रामन् कृतमवाप्नुयात् ।

But if he is sent away without any fault before the expiry of the

settled period, he will get full remuneration and the employer may even be fined by the king for having dismissed the employee without any excuse (Vishnu cited in Viramitrodaya):

स्वामी चेद् भृतकमपूर्णे काले जह्वाततस्य सवर्ष-मेव मूलं दद्यात्,
पणशतञ्च राजम्यंयत्र भृत्यदोषात् ।

When a man, engaged in a service, refuses to work without any excuse, he may not have to return the wages which he may have received, but may be punished with a fine. Even if no wages have been paid in advance the employer will have to be compensated for the breach of contract of service.

When owing to neglect on his part, an employee destroys or injures any article placed under his care the master will have to be compensated for the loss; but if it is due to some accident, the employee is not answerable (Vishnu cited in Viramitrodaya.)

**Loss or destruction of any article.
Its effect.**

तद्दोषेण यद्विनश्येत् स्वामिने देयमन्यत्र दैवोपघातात् ॥

And if the loss is caused by him out of spite, he shall have to repay the loss twice over by reason of his gross misconduct (Vrihat Manu cited in Viramitrodaya):

प्रमादान्नाशितं दान्यः समं विद्रोहनाशितं ॥

Principles which regulate payment of hire are practically the same as those which govern the payment of wages by an employer. A person who hires a carriage or a horse and does not take it away for using it shall have to pay one-fourth of the hire or fare as compensation, but after he takes it away, he becomes liable to pay the full hire settled even though he may return it without using it. The same principles govern the hiring of houses, shops etc.

Manu has laid down the following rules concerning non-payment of wages to workmen, herdsmen, and *royal servants* and for dealing with disputes arising from transgressions made by master, his cattle and herdsmen:

If the employee transgresses the direction of the employer as to time or place he shall get wages according to the latter's choice.

Manu (VIII. 215-218, non-payment of wages) : A hired (servant or workman) who, without being ill, out of pride, fails to perform work according to the agreement shall be fined 8 Krishnas and no wages shall be paid to him [215] But (if he is really) ill and after

Letting on hire.

recovery performs his work. according to the original agreement, he shall receive his wages even after the lapse of a very long time [216] But if he, whether sick or well, does not perform or cause to be performed by others his work according to the agreement the wages for that work shall not be given to him, even (if it be only) slightly incomplete. 217 Thus the law for the non-payment of wages has been completely stated. (218)

Manu [VIII. 229-244]: During the day, the responsibility for the safety of the cattle rests with the herdsmen, during the night on the owner (provided they are) in his house; if it be otherwise, the herdsmen will be responsible for them also during the night (229). A hired herdsman who is paid with milk, may milch with the consent of the owner the best cow out of ten; such shall be his hire, if no other wages are paid (231). The herdsman alone shall make good the loss of a beast strayed, destroyed by worms, killed by dogs, or by falling into a pit, if he did not duly exert himself to prevent it (232), but for an animal stolen by thieves though he raised an alarm, the herdsman shall not pay, provided he gives notice to his master at the proper place and time (233). If cattle die, let him carry to his master their ears, skins, tails, bladders, tendons, and the yellow concrete bile, and let him point out their particular marks (234). But if goats or sheep are surrounded by wolves and the herdsman does not hasten (give assistance to), he shall be responsible for any animal which a wolf may attack and kill (235). But if they are kept in proper order, grazed together in a forest, and a wolf suddenly jumping on one of them kills it, the herdsman shall bear in that case no responsibility (236).

Payment of wages to public servants: (Manu VII. 125-126): For women employed in the royal service and for menial servants, let him (the king) fix a daily maintenance in proportion to their position and their work. (125) "One Panna must be given (daily) as wages to the lowest and to the highest likewise, clothing every 6 months and one Drua of grain every month (126).

SECTION 7. TRANSGRESSION OF COMPACT

Transgression of Compact सम्बन्धतिक्कम (सम्बन्धत् meaning a compact) was also one of the topics of litigation. The Hindu society was divided into several associations which were composed of a number of persons engaged in a common undertaking or connected by a community of interest or views. The claims of representative associations were recognised even by the king. The rules and regulations were enjoined to be followed by the members of the association and their breach furnished a ground for an action against the delinquent. The rules were

framed with the consent of the members or were made by the king who founded that particular body with certain directions. So the rules were to be observed by the members, if they were not opposed to the sacred law ; and the directions of the king relating thereto were also to be similarly observed. (Yajnavalkya II. 185) :

निजधर्माविरोधेन यस्तु सामयिको भवेत् ।

सोऽपि यत्नन संरक्ष्यो धर्मो राजकृतश्च यः ॥

These associations were to appoint from among themselves two, three or five persons to form a sort of executive committee ; these men were called advisers of the association **समूहहितवानी** or thinkers of business **कार्यचिन्तक** । The directions were to be obeyed by the general members of the association (Vrihaspati cited in Viramitrodaya on Breach of contract) :

द्वौत्रयः पञ्च वाकार्याः समूहहितवादिनः ।

कर्त्तव्यं वचनं तेषां ग्रामश्रेणिगणादिभिः ॥

Vrihaspati has laid down the qualifications for the membership of an executive body that those who are spiteful, prone to lust or wrath, bashful, lazy, timid, greedy, too old, or too young should not be taken in the executive committee which should be composed of persons who are pure, aware of the sacred law as unfolded in the Vedas, expert in action, possessed of self-control, born of a good family, experienced in business, and guided by high principles (Vrihaspati cited in Viramitrodaya).

विद्वेषिणो व्यसनिनः शालीनालसभीरवः ।

लुब्धातिवृद्धबालाश्च न कार्याः कार्यचिन्तकाः ॥

शुचयो धर्मवेदज्ञाः दक्षा दान्ताः कुलोद्भवाः ।

सर्वकार्यप्रवीणाश्च कर्त्तव्याश्च महत्तमाः ॥

Penalties were prescribed to enforce obedience to the rules and regulations of the association. Its delegates approaching the king were to be received by him with respect and honoured with suitable presents, and allowed to depart with their mission fulfilled (Yajnavalkya II. 189).

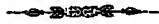
समूहकार्यं आयातान् कृतकार्यान् विसर्जयेत् ।

सदानमानसत्कारैः पूजयित्वा महीपतिः ॥

These rules indicate a high standard of culture of the Hindu Society even in the so-called pre-historic ages.

CHAPTER V

LAW OF TORTS



SECTION I. INTRODUCTION

This branch of law which governs actions for damages for injuries in respect of certain kinds of rights, such as, personal security property, reputation, *etc.* has attained huge proportions and involves a great deal of litigation in England, though not to the same extent in India. It relates to questions of conflict between the rights of individuals as contrasted with the collective rights of society. The development of industrial life in India, the beginnings of which can be discerned in some important towns, is bound to lead to litigation of a new type. Workmen must claim compensation for injuries sustained by them in the course of their employment. The law of torts was a growing organism in ancient days too and it has now become so all the more, because of the practice of boycott, general strikes, *etc.*

The Hindu Law had from the earliest times a law of torts for the redress of private wrongs. There is no doubt that the Hindu Law in respect of crimes is more comprehensive than its law of compensation for injuries, *etc.* and prescribes punishments for wrongs which would now be regarded as giving rise to merely civil causes of action, *e. g.*, non-payment of debt, breaches of contract *etc.* The Hindu civil and criminal law is discussed under eighteen heads; the rules of compensation for injuries are comparatively unimportant and only incidental references to them have been made. The right to recover compensation is recognised in three cases, such as (a) damage to crops by trespass of cattle, (b) bodily injury resulting in medical and other expenses for cure and (3) damages intentional or otherwise to goods. Later Smritis, which adopting Manu's divisions of law, give a larger number of rules on the subject, evolved by the successive developments of the age. Viramitrodaya in the 17th century gives an amplified interpretation and a detailed account of this branch of law with technical phraseology, which is practically similar to the subject-matter of the modern law of torts. He discussed such topics as injuries to person and property, cattle-trespass, fraud of vendors,

negligence or fraud of carriers or of bailees under different kinds of bailments, measure of damages in different cases, *etc.*

There is one important point of difference between the Hindu Law and the English law of torts, *vis*, that in Hindu law compensation is allowed only when there is pecuniary loss and not in other cases like assault, false imprisonment, defamation, insult, adultery, *etc.*, which are only punishable and not actionable wrongs. Thus in Hindu Law, tort has a much narrower and restricted legal conception than the tort of the English law or *delictum* of the Roman law.

Sir Henry Maine observes: "The penal law of ancient communities is not the law of crimes, it is the law of wrongs, or to use the English technical word, of torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money-damages, if he succeeds." In explaining and illustrating these observations he says that the offences which were treated exclusively as crimes were treated as torts, not theft only but assault, robbery, libel and slander also and were all requited by a payment of money; he further points out that the old German Law was also the same and permitted money compensation for homicide. The position of Hindu Law was quite different as has been nicely summarised by Dr. Sen: "It seems to me that in the Hindu Law, punishment of crimes occupied a more

Punishment of crimes occupied a more prominent place than compensation for wrongs in Hindu Law.

prominent place than compensation for wrongs, and the mere payment of compensation to the individual injured, when the injury inflicted was at all serious in its character, was seldom regarded as sufficient to meet the ends of justice; of course, under certain circumstances the wrong-doer was compelled to compensate the person wronged, but the compensation was generally levied in addition to and not in substitution for the penalty which it was considered to be the duty of the king to impose." 'A king,' says Manu (VIII. 123), 'who punishes those who do not deserve to be condemned and fails to punish those who deserve punishment becomes infamous and is ultimately doomed to hell'

अदण्ड्यान् दण्डयन् राजा दण्ड्याश्चैवाप्यदण्डयन् ।

अयशो महदाप्नोति नरकञ्चैव गच्छति ॥

Neither theft, nor violence, nor any other form of serious injury to person or property could be condoned on mere payment of compensation to the party injured, but it was regarded as the duty of the king to

punish the culprit for his offence against the law. It may, therefore, be safely asserted that the penal law of the Hindus was the law of crimes in its strict sense, and the law of torts occupied a comparatively subordinate and less important position in that system. Then, further, even apart from the nature of the penalty that was imposed by the Hindu Law, there was another characteristic element in the procedure to be adopted in relation to a criminal act which showed that the distinctive feature of the crime as opposed to mere private injury was not at all lost sight of; for we find that it was generally directed that neither a king nor his officers should create or foster litigation of their own accord नोत्पादायेत्स्वयं कार्यं राजानाप्यस्यपूरुषः (Manu VIII. 43) but should ordinarily refuse to take cognisance of a cause of action without a complaint from the person aggrieved. Cases of fraud and various other forms of crime furnished exception to the general rule and in respect of these the king could take cognisance even without a complaint.

छलानि चापराधांश्च पदानि नृपतेस्तथा ।

स्वयमेतानि गृहीयान्नृपस्त्वावेदकैर्विना ॥

[Pitamaha]

Even more, the king was directed to employ officers to obtain information of crimes committed within his dominion to ensure the punishment of culprits.

नृपेण विनियुक्तो यः परदोषान्ववेक्षणे ।

नृपस्य सूचयेज् ज्ञात्वा सूचकः स उदाहृतः ॥

It is thus apparent from the above considerations that although Hindu lawgivers did not expressly say so, they condemned a crime not so much because it involved an infringement of a private right, but because it imperilled the security and the tranquility of society or the people in general.

When, therefore, the injury caused is looked at from the stand-

**Distinction
between a tort
and a crime as
made by Hindu
Law.**

point of an individual and compensation is sought to be paid it is treated as a tort; but when the same act or offence is treated as a transgression of sacred law which threatens the security and the tranquility of the community and which must be punished irrespective of any consideration of the injured individual, it is treated as a crime. Our Dharma-shastras have not contradistinguished the two aforesaid aspects, but the same is implied in their prescription of penalties and procedure in the two cases.

The principle of *injuria sine damnum* of English Law which

**Injuria sine
damnum not re-
cognised in Hin-
du Law.**

implies the payment of compensation for an infringement of a person's rights although he may not have sustained any substantial loss or damage in the shape of a definite temporal disadvantage, as elaborately and tersely explained in a leading case, *Ashby v. White* (1703. 2 Ld. Raym. 938), has not been recognised at all by the Hindu jurists. Hindu Law did not take such a rigorous view of civil liability as to allow pecuniary compensation for a mere infringement of a private right not resulting in a real and substantial damage to the injured person. Slander and adultery were treated as crimes punishable by the king but were not recognised as private wrongs. Our lawgivers were not imbued with a commercial spirit so as to place money value on everything. It would appear that under the Hindu Law no pecuniary compensation could be awarded unless the injury involved an actual pecuniary loss to the injured party.

SECTION 2 WRONGS AGAINST PERSON AND PROPERTY

The different topics under the law of torts may now be considered in the light of the Hindu system of jurisprudence :

Under the Hindu Law, for the use of personal violence the offender made himself liable criminally and also civilly in torts for the payment of money compensation to the wronged person ; the compensation was granted not only in view of the expenses which the injured person might have incurred to recover from the effect of the violence but also as a *solatium* for the pain inflicted upon him.

I. Injury to person.

देहेन्द्रियविनाशे तु यथा दण्डं प्रकल्पयेत् ।

तथा तुष्टिकरं देयं समुत्थानञ्च पण्डितैः ॥

[Katyayana]

For assault or mere menace the wronged party was not allowed any compensation but it was punishable as a crime.

For injury to person it was laid down that whoever caused hurt to a domestic animal belonging to another became liable to compensate the owner of the animal for the consequent loss. (Vishnu)

II. Injury to property.

सर्व्वे पुरुषपीडाकराः समुत्थानव्यन्दाया ग्राम्यपशुपीडाकराश्च ।

In the same way whoever cut or otherwise destroyed trees *etc.*, bearing fruits or yielding some sort of produce rendered himself liable to compensate the owner to the extent of the value of the usufruct lost during the time necessary to grow similar trees yielding

similar produce: (Yajñavalkya II. 161):

यावत्तस्य बिनश्येत् तावत्क्षेत्री फलं लभेत् ।

When the fields on the roadside or border of a public high way were not enclosed by fences, the owner of cattle spoiling the field or growing crops or trees, was not held liable; as in such a case it was considered the duty of the owner of the field to take the precaution of keeping it properly fenced. (Yajñavalkya II. 162):

प्रथिग्रामबिबीतान्ते क्षेत्रे दोषो न विद्यते ॥

But this exception did not hold good if the action of the owner of the cattle was deliberate. Trespass upon another's property causing damage was regarded as a wrong for which the trespasser was made liable to pay compensation.

Conversion of another's property to one's own use was also treated as a wrong and the rightful owner could claim compensation from the offender. In case of a theft, the wrong-doer had to pay the price to the owner besides being punished for the crime. The king was bound to indemnify the injured person by paying the price from his own treasury if he could not get the stolen property restored to the owner, and in his turn he could recover the same from the village officers who, by reason of their negligence, were accountable for the thief's escape.

III. Conversion.

देयं चौरहतं द्रव्यं राज्ञा जानपदाय तु ।

अददद्भिः समाप्नोति कित्तिवर्षं यस्य तस्य तत् ॥ [Yajñavalkya II. 36]

Thus the Hindu Law provided all means to protect the property of the subjects by imposing responsibility thereof on the king and his officers.

Practice of fraud on any person entitled him to recover damages from the wrong-doer. When a seller deceitfully sold a defective article after having shown a genuine one the purchaser was entitled to compensation, which in some cases even extended to double the price paid by him.

IV. Fraud.

निर्दोषं दर्शयित्वा तु सदोषं यः प्रयच्छति ।

स मूल्यादिद्विगुणं दाप्यो बिनयं तावदेव तु ॥ [Narada VIII. 7]

If the act of the seller was deliberate, the sale could be rescinded without any compensation.

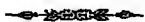
A nuisance was both either a private or a public one. In either case the offender was not only enjoined to remove

V. Nuisance.

the nuisance but also rendered himself liable to punishment.

CHAPTER VI

LAW OF CRIMES OR SAHASA



SECTION I. INTRODUCTION

Sahasa means acts of violence and includes all crimes. P. V. Kane defines it thus, "*Sahasa* comprehends many offences in all of which the use of force or threat is an essential element." The king is enjoined by our Dharma-shastras to punish the offenders. Yajnavalkya (I. 367) gives four kinds of punishment, *viz.*, censure, rebuke, pecuniary punishment, and corporal punishment, and says that these should be used either separately or jointly according to the nature of the crime.

धिग्दण्डस्त्वथ वाग्दण्डो धनदण्डो बधस्तथा ।

योज्या व्यस्ताः समस्ता वा ह्यपराधवशादिमे ॥

Of these, censure was the lightest and next to it was rebuke ; pecuniary punishment included fine and forfeiture of property, and corporal punishment included imprisonment, banishment, branding, cutting off of offending limbs and lastly capital punishment. The measure of punishment depended chiefly on the gravity of the offence ; Yajnavalkya (I. 368) says that the king should inflict punishment upon those who deserve the same, after ascertaining and taking note of the nature of the offence, the time and the place (of the offence), and the strength, age, avocation and wealth (of the culprit) :

ज्ञात्वापराधं देशञ्च कालं बलमथापि वा ।

वयः कर्मञ्च बिसृञ्च दण्डं दण्ड्येषु पातयेत् ॥

The Mitakshara commenting on this text says that along with these the question whether the offence was committed with or without deliberation and whether it was the first offence or a repetition of the same should also be taken into consideration in passing the sentence :

तथा बुद्धिपूर्वबुद्धिपूर्वं सकृदावृत्त्यनुसारेण च ।

Yajnavalkya (II. 275) while dealing with punishment for theft says that it should vary according to the value of the articles stolen ; and the place and the time (of the offence) as well as the age and the

strength (of the offender) should also be taken into consideration.

लुप्तमभ्यमहाद्रव्यहरणे सारतो दमः ।

देशकालवयः शक्ति सञ्चिवन्त्यं दण्डमर्म्मणि ॥

[Yaj II. 475]

According to the Mitakshara all the above facts for punishment are illustrative and indicate considerable advance of juristic ideas in the field of Criminal Law, and a practical method of modulating the sentences prescribed by law so as to make them pliable enough to meet the ends of justice in each case without violating the theoretical rigidity of the Shastras. One exceptional rule is of particular importance that punishment depended upon the difference in caste, *vis*, a Brahman could never be subjected to corporal punishment, however grave the offence.

अविशेषेण सर्वेषामेषदण्डविधिःस्मृतः ।

वधादृते ब्राह्मणस्य न वर्धं ब्राह्मणोऽर्हति ॥

He could, however, be for very serious offences imprisoned or put in chains, and even branded and banished from the country under marks of ignominy and disgrace

यमोऽपि न शारीरी ब्राह्मणस्य दण्डो भवति कस्यचित् ।

गुप्तेतु बन्धने बद्धा राजभक्तं प्रदापयेत् ॥

[Yama]

He did not enjoy absolute immunity except that no corporal punishment could ever be inflicted upon him. Besides this distinction, a person belonging to a higher caste was generally subjected to a higher punishment than one belonging to a lower caste for an offence of an apparently similar description. This rule could be justified in cases where insult or indignity was a constituent element of the offence. But in offences of moral depravity, the infliction of the punishment was reversed in accordance with the gradation of the caste. Thus dealing with punishment for theft, Manu says that a Shudra knowing what is right and wrong should get eight times the punishment prescribed to be inflicted on one ignorant of the same; a Vaishya having a similar knowledge sixteen times; a Kshatriya, similarly situated, thirty-two times; and a Brahman sixty-four times or even full hundred times, or one hundred and twenty-eight times, since he knows what is right and what is wrong (Manu VIII. 337, 338)

अष्टापाद्यन्तु शूद्रस्य स्तेये भवति क्लृप्तवर्षं ।

षोडशैव तु वैश्यस्य द्वार्षिंशत् क्षत्रियस्य च ॥

ब्राह्मणस्य चतुःषष्टिः पूर्णंवापि शतं भवेत् ।

द्विगुणा वा चतुःषष्टिस्तद्दोषगुणविद्धि सः ॥

Hindu Law is, therefore, quite impartial and makes no exception in the matter of punishment. Yajnavalkya (I. 357-58) says, 'No one who has transgressed the law is exempt from punishment by the king, be he a brother, a son, an object of worship (such as a preceptor), a father-in-law or a maternal uncle.

अपि धाता सुतोऽभ्यौ वा श्वशुरो मातुलोऽपि वा ।

नादण्ड्यो नाम राज्ञोऽस्ति धर्माद्विचलितः स्वकात् ।

Manu says "When an ordinary man is punishable with a fine of one Karshapana, the king (committing the offence) should punish himself with thousand times the amount, and the commentators hold that he should distribute the sum among Brahmins.

कार्षापणं भवेद्दण्ड्यो यत्राम्यः प्राकृतो जनः ।

तत्र राजा भवेद्दण्ड्यः सहस्रमिति धारणा ॥

SECTION 2. PRINCIPAL OFFENCES OR CRIMES

Secular crimes and transgressions, that is, those that are punishable by the king, are dealt along with their corresponding punishments, in the Dharma-shastra in the chapter on the duties of kings without much systematic arrangement. In Manu's Code Criminal law is classified according as it relates to (1) real and (2) virtual injuries, (3) theft, (4) violence and (5) sexual crimes and constituted 11 to 15 of its 18 titles of law. Therefore, the task of describing the principal offences is by no means an easy one. Following the arrangement of Visṇu we will, therefore, state the principal ones as are understood to be (1) अतिपातक and (2) महापातक and will, as far as possible, state those as are specially noticed by Dr. Jolly.

- (1) Theft and abettors of thieves (VIII. 34, 302)
- (2) False evidence (VIII. 90)
- (3) Perjury (VIII. 120)
- (4) Robbery and violence (VIII. 332)
- (5) Murder-homicide (IX, 55, 57, 67)
- (6) Assault (VIII. 279-301)
- (7) Adultery (VIII. 354, 355, 361-63, 371-72, 373, 375, 378, 379, etc.)
- (8) Gambling and betting (VIII. 221, 223)
- (9) Adulteration of merchandise (VIII. 286)
- (10) All incantations intended to destroy life and various kinds of sorcery (VIII. 290)
- (11) Forgers of Royal edicts (VIII. 232)

- (12) Intentional causing of pain to a Brahman (VIII. 248)
- (13) Nuisance (IX. 282-283)
- (14) Fraud (IX.)
- (15) Forgery (IX. 232)
- (16) Destroying the flags (IX. 285)
- (17) Self-defence-Assassin (VIII. 348-51)
- (18) Corruption in officials (Judges) (VIII.)
- (19) Unnatural crime (burying a son Kritaka, Paunabhava) (IX. 174-75)
- (20) Verbal abuse (VIII. 274)

On a systematic classification these offences may be described as under :—

I. Verbal abuse वाक्पादय्य having its three divisions—(1) cruel निष्ठुर (2) indecent अश्लील and (3) severe तीव्र:

कारुणं वाप्यथवा खड्गमम्यं वापि तथाविधम् ।

तथ्येनापि ब्रुवन् दाप्यो दण्डं कार्षापणावरम् ॥ [Manu VIII. 274]

Truth is no defence in a case of verbal abuse, although falsehood may be regarded as aggravating the offence, for the gist of the offence consists in the intentional insult which the complainant suffers from the accused. This was one of the principal kinds of offences under the Hindu Law, and the relative position of the parties was considered at the time of inflicting the punishment. When a person threatened another with personal injury, then, if the person so threatening was incapable of carrying out the threat, he was to be punished with a fine; but if he was so capable, he was also required to give sureties for his future good behaviour. Yajnavalkya (II, 209):

अशकस्तु वदनेवं दण्डनीयः पणान् दश ।

तथाशक्तः प्रतिभुवं दाप्यः क्षेमाय तस्य तु ॥

II. Personal violence दण्डपादय्य having its three divisions—(1) assault अवगोरण (2) battery निशङ्कपातन and (3) causing of wound क्षतदर्शन । It also included cruelty to animals.

III. Violent offences साहस—In its restricted sense it denoted some specific offences, such as, mischief, robbery, murder, etc., characterised by deliberate and aggressive violence. There are three degrees of this kind of offence, प्रथम (of the first degree), मध्यम (intermediate) and उत्तम (grave).

IV. Offences against female modesty स्त्रीसंग्रहण including seduction, adultery and rape. They were divided into three classes according to the means used by the man, such as (1) force, (2) fraud,

or (3) mutual amorous desire (Mit. on Yaj. II, 230):

पापमूलं संगम्यं त्रिप्रकारमिबोधत ।

बलोपधिकृते द्वे तु तृतीयमनुरागजं ॥ [Vrihaspati cited in Viramirodaya on Strisangrahana]

Adultery : In the case of adultery the distinction of caste was of the greatest importance. Moreover it made all the difference whether the adulteress was properly guarded (गुप्ता) or not, for if the necessary vigilance was lacking, the sentence would be mild and particular importance would be attached to the question if violence was applied.

Thus, for adultery with the wife of an Aryan the Guru could have his organ cut off and his property confiscated, and if the woman was under guards he was to be executed. On the other hand a Brahman for a similar crime had to pay only a fine of 500 Panas if the woman was willing, and 1,000 Panas in the case of forcible violence. As Manu (VIII. 378) observes :—

सहस्रं ब्राह्मणो दण्ड्यः गुप्तां विप्रां वलात् ब्रजन् ।

शतानि पञ्च दण्ड्यः स्यात् इच्छुस्या सह संगतः ॥

For a Kshatriya and a Vaishya there are proportionately higher punishments aggravated by incarceration, shaving of hair, by pouring the urine of an ass on the head.

वैश्यः सर्वस्वदण्डः स्यात् संवत्सरनिरोधतः ।

सहस्रं क्षत्रियो दण्ड्यो मौण्ड्यं मूत्रेण चाहति ॥ [Manu VIII. 375]

Manu (VIII. 352) lays down the following punishments for adultery :—

(1) For men addicted to adultery :—

परदाराभिमुखेषु प्रवृत्तान् ननुमहीपतिः ।

उद्वेजनकरैर्दण्डैश्छिन्नयित्वा प्रवासयेत् ॥

(2) For conversing in secret with a woman by a man who has been previously accused of a similar offence, the punishment prescribed is slight in respect of the first enticement, but there is no punishment for a man not so previously accused for conversing with a woman for some good reason (Manu VIII. 354, 355). But mendicants, bards, persons initiated for a rite and craftsmen may converse with women unchecked (Manu VIII. 360).

(3) If one who is forbidden to converse, transgresses the prohibition, he should be fined one Suvarna (VIII. 361).

(4) This rule does not apply in the case of wives of dancers and singers, or of those who make a living by their wives. Yet he who secretly carries on a conversation with these women or with slave

girls devoted to one master, or with female ascetics should be made to pay some small fine (Manu VIII. 362, 363).

(5) Penalties for sexual intercourse vary according to castes and according as the woman was protected or not in the following manner :

(a) A Brahmin with a protected Brahmin woman when there is force used, the fine is Rs. 1,000 Panas.

(b) In the above case if the woman was willing, 500 Panas. (Manu VIII. 378).

A fine of 1,000 Panas is prescribed for a Brahmin having intercourse through force with a protected Brahmin or Kshatriya or Vaishya or Sudra woman; and for a Kshatriya or a Vaishya approaching a Sudra woman the same; a Kshatriya or Vaishya approaching a Sudra woman also the same.

For a Brahmin having intercourse with a willing protected Brahmin woman or with an unprotected Kshatriya or Vaishya or Sudra woman, the fine is 500.

If a Vaishya approaches a protected Kshatriya woman, 500, and, *vice versa*, 1000. If a Kshatriya or a Vaishya violates the chastity of a Sudra woman, 1000.

A Vaishya having intercourse with a Brahmin woman should be deprived of his entire property after a year's imprisonment and a Kshatriya is to be fined 1000 (Manu VIII. 375).

A Sudra having intercourse with a twice-born woman protected or unprotected shall be deprived of his limb and the whole of his property in the case of an unprotected woman, and of every thing in the case of a protected woman.

(6) If a man convicted of and punished for adultery with a woman commits the same offence again with the same woman within a year, his fine shall be doubled. In the case of his repeated intercourse with a ~~व्रतया~~ the fine shall be the same as in the case of a Chandali (VIII. 373).

(7) Manu lays down that in cases where death penalty is prescribed, it should be transportation for the Brahmin and actual death for others (Manu VIII. 379).

(8) As regards punishment for the woman who is proud of her beauty, and commits adultery, Manu lays down that the king shall have her devoured by dogs in the presence of good many people (VIII. 371).

Thus the extent of the improper conduct of the parties as well as the relative position based on caste distinction of the man and the woman was to be considered in inflicting punishment. The woman

was also punished when the criminal intercourse proceeded from mutual amour. Owing to the fact that the man takes the lead in the commitment of the crime and the woman naturally succumbs to the allurements, she was liable to get half of the punishment that was prescribed for the man. An exceptional case has been mentioned by Vrihaspati that where a woman followed a man to his house and there allured him by soft touches, *etc.*, then she was to receive a higher punishment than the man :

गृहमागत्य या नारी प्रलोभ्य स्पर्शनादिना ।

कामयेत्तत्र सा दण्ड्या नरस्यार्द्धदम्ः स्मृतः ॥

But these niceties were not taken into account by modern jurists, who let the woman go scot-free in such cases of adultery.

V. Theft स्तेय.—According to the value of the article stolen it may be of three classes: (1) paltry theft लुब्ध, (2) theft of ordinary magnitude मध्य and (3) theft of precious thing उत्तम.

This term is used in a very wide sense to mean every offence against property which arises out of avarice and is done by fraud and deceit. It covers offences analogous to theft characterised by slyness as distinguished from violence. In this sense it is of two kinds: (1) open theft प्रकाश and (2) concealed theft अप्रकाश । प्रकाशाश्चाप्रकाशाश्च तस्करा द्विविधाः स्मृताः (Vrihaspati).

Distinguishing theft from robbery Manu (VIII. 332) says:—

स्यात् साहसं त्वन्वयवत् प्रसमं कर्मयत्कृतम् ।

निरन्वयं भवेत् स्तेयं हृत्वापन्ययते च यत् ॥

There are two kinds of thieves, one concealed and the other open :

द्विविधास्तस्करान् विद्यात् परद्रव्यापहारकान् ।

प्रकाशाश्चाप्रकाशाश्च ॥

Open thieves are those who make a living by dealing in various commodities, and "secret" thieves are burglars, robbers, and so forth, as also those who accept bribes, cheats, fortune-tellers, palmists, misbehaved high officials and physicians, art-exhibitors, harlots (IX. 257, 259).

Punishments for theft were very heavy in all cases of serious crime. The accused was sentenced to death, was impaled, hanged or drowned, and often his hands were hacked off and other tortures inflicted to aggravate the punishment. The same punishments were also ordained for *burglary* frequently repeated, *picking pockets*; *robbery*; *stealing* cows or horses or more than ten Kumbha's of grain or

more than ten Pana's of precious metals, particularly valuable jewels, etc.

धान्यं दशभ्यः कुम्भेभ्यो हरतोऽभ्यधिकं वधः ।
 शेषेऽप्येकादशगुणं दाप्यस्तस्य च तद्धनम् ॥
 तथा धरिममेयानां शतादभ्यधिके वधः ।
 सुवर्णरजतादीनामुत्तमानां च वाससाम् ॥
 पुरुषाणां कुलीनानां नारीणां च विशेषतः ।
 मुख्यानां चैव रत्नानां हरणे वधमर्हति ॥

[Manu VIII, 320,
321, 323.]

VI. Some minor offences :—

1. *Trespass*
2. *Encroachment on another's land*
3. *Public nuisance*
4. *False evidence*
5. *Refusal to give evidence*
6. *Production of fraudulent and forged document*
7. *Corruption in a judge*
8. *Omission to bring certain offences to the notice of king's officers.*
9. *Negligence.*
10. *Absentment.*

The above enumeration is not exhaustive but only illustrative, as according to Vrihaspati the offences may take a thousand different forms by reason of differences in intellect, capacity and skill of the offender.

प्रज्ञासामर्थ्यमायामिः प्रमिसास्ते सहस्रधा ।

An infant below eight years of age was treated as a child in its mother's womb and could not be held criminally liable for any offence. **Exemption from criminal liability.** गर्भस्थैः सदृशो ज्ञेयः

आष्टमाद्वत्सराच्छिशुः । According to Animandavya in Mahabharata an infant within fourteen years cannot incur any sin, as he has no knowledge of the rules of proper conduct. This is carrying the rule a little too far, and Nilkantha finds a solution by saying that exemption from responsibility extends so long as the infant cannot discriminate between right and wrong, and no definite age-limit can be set to meet every case.

चतुर्दंशादुद्धवं पापमस्तीति पौराणं मतमिदं ।

अस्तुतस्तु भक्तहेतोः पुण्यपापविभागज्ञानपर्यन्तमेव पापानुत्पत्तिः ॥

A king who condemns the innocent and absolves the guilty subjects himself to great disgrace and goes to hell. The primary object

of punishment is the protection of the people, as Manu (VII. 18) says : "Penalty keeps the people under control, penalty protects them, penalty remains awake when people are asleep ; so the wise have regarded punishment as a Dharma or a source of righteousness."

दण्डः शास्ति प्रजाः सर्वा दण्ड एवाभिरक्षति ।

दण्डः सुप्तेषु जागर्ति दण्डं धर्मे विदुर्बुधाः ॥

Punishment has also been treated as a source of purification of the culprit. Manu (VIII. 18) says : "Men who are guilty of crimes being condemned by the king become pure and go to heaven in the same way as good and virtuous men."

राजनिर्द्धूतदण्डास्तु कृत्वा पापानि मानवाः ।

निर्मलाः स्वर्गमाप्स्यन्ति सन्तः सुकृतिनो यथा ॥

VII. Gambling घृत and Betting समाक्षय—Gambling is described as artful playing with inanimate objects, such as, dice, *etc.*, but when the result turns out to be the contest of some animate objects, such as, horse race, it is termed betting. Both are based on the laying of wagers. Manu (IX. 221, 222) expressly laid down that the king should exclude from his kingdom Gambling, and Betting, which resembled open theft should, therefore, be suppressed.

प्रकाशमेतत्सास्कर्यं यद्देवनसमाह्वयौ ।

तयोर्नित्यं प्रतीघाते नृपतिर्यत्नवान् भवेत् ॥

[IX. 223]

घृतं समाह्वयञ्चैव राजा राष्ट्रास्त्रिवारयेत् ।

[IX. 222]

But Vrihaspati (26 ; 1, 2) said "Gambling was prohibited by Manu as it strikes against truth, purity and wealth ; but others have sanctioned it when licensed by payment of a tax to the king ; it should be presided over by a person entrusted with the duty of superintending the transaction in order to ensure the detection of fraud and sharp practice." The Mitakshara (2 ; 202) and others commented that the text of Manu referred to gambling and betting unauthorised by the king. The superintendent of the Gaming House was to conduct the game, collect the share of the king, and also obtain a share for himself. Yajnavalkya (II. 203) also says, "In as much as it helps in the discovery of thieves. Gambling shall be carried on under the supervision of one officer appointed by the king."

घृतमेकमुल्लं कार्यं तत्स्करज्ञानकारणात् ॥

For playing with false dice, the person was to be punished with a fine, and the stakes won had to be refunded. If there was cheating

and other malpractices, the punishment meted out was that of a thief (Arthashastra III. 20).

G a m b l i n g In case of any dispute between gamblers, other
disputes. gamblers were to act as judges and witnesses to settle the dispute (Narada XVII. 4)

VIII Boundary Disputes --The law about the settlement of boundary disputes, principally in the case of disputes between two neighbouring villages is now to be taken into consideration. Manu lays down the rules for deciding the disputes concerning a boundary between two villages in Chapter VIII.

A village has a definite boundary on every side which marks it off from the neighbouring villages.

(1) In the first place the power is given to the king to settle such disputes by an inspection of the boundary marks, when they are visible. The king is enjoined to do so in the month of (**ज्येष्ठ**) *Jyeshtha*, because then land marks are most distinctly visible, being midmost summer, when the sun has scorched all grass and plants.

Now the landmarks according to Manu are of two kinds (1) the visible or open marks, and (2) the hidden or secret marks. Those marks which are made by trees, such as Nyagrodh, Asvathas, Kimsukas, cotton trees, Salas, Palms and trees with juice, clustering shrubs, bamboos of different kinds, Samis, creepers, or raised mounds, reeds, thickets of Kubgaka, are called visible marks because by the land marks made in this manner, the boundary will not be forgotten. But as through men's ignorance of the boundaries, changes constantly occur in the world, the king is also enjoined to see that besides the above other hidden marks are also made. These are made by planting or fixing such things as the earth does not corrode even after a long time, e.g., stones, bones, *cow's hair*, chaff, ashes, dry cowdung, bricks, cinders, pebbles and sand.

According to Kulluka who relies on Vihaṣpati, these objects are to be placed in a jar.

With the help of these marks, and by long continued possession as well as by constantly flowing streams of water, the king shall ascertain the boundary of land of two disputing parties.

(2) If there be a doubt with regard to the marks, the settlement of boundary disputes shall depend on witnesses.

The witnesses should be from the villages between whom the dispute lies. But they should be veracious witnesses and a punishment of a fine of 200 Panas is prescribed for witnesses, who determine the dispute unjustly. The witnesses will be taken to be veracious if they settle the boundary in accordance with the truth, putting earth on their

heads, wearing chaplets of red flowers and red dresses. These witnesses are to be examined concerning the land marks in the presence of the crowd of the villagers and also of the two litigants.

If the witnesses decide unanimously, the king is enjoined to record the boundary *सीमा पत्र* in writing, together with the names of witnesses. Migha says that if the witnesses disagree, the opinion of the majority shall prevail.

If witnesses from the two villages are not available, then men from four neighbouring villages, who are original inhabitants of these villages and who are honest should be called and should decide the dispute, but this should be done in the presence of the king.

Some people often stop in the neighbourhood of the disputed boundaries, be it for ploughing or as cowherds, snake-charmers, hunters and forest rangers. According to commentators these people are in a position to know best the boundaries of the villages which may often lie on wastes or in the wilderness.

(3) On failure of getting these people who may be reckoned competent witnesses as being neighbours and original inhabitants of the village, the king may hear and examine the evidence of even the inhabitants of the forests, such as hunters, fowlers, herdsmen, fishermen, root-diggers, snake-catchers, gleaners and other foresters, but if they are examined and are able to declare the marks of the boundaries, the king is enjoined to cause them to be fixed, provided it can be done justly.

(4) If no evidence is forthcoming or the evidence as tendered is not sufficient, the king is given the power of assigning the land on his individual judgment, provided he is righteous and acts for the benefit of them all. This is the settled rule.

It is distinctly laid down that the decision concerning the boundary marks of *fields, wells, tanks, gardens and houses* depends upon the evidence of neighbours, and only on failure of these the king has got the above power.

Manu also prescribes punishments for witnesses for giving false evidence, the king being entitled to make each false witness pay the middlemost announcement (500 Panas are considered as the mean or middlemost announcement).

Then he who by intimidation possesses himself of a house, a tank, a garden or a field shall be fined 500 Panas; if he trespassed in his ignorance the fine shall be 200 Panas.

In ancient India, the village formed the political limit, the smallest unit which the Smritis prescribe for the management of a principality. But though joint property among families was very much in vogue,

traces of a common property of the whole village community are much less clear and the data in the Smritis is much less definite on this point. On the boundary line of every village there were pasture lands extending in a wide circle round the village. Of course these fields were used by the villagers for grazing their cattle in common, but on the other hand fields surrounded with hedges appear always to have belonged to individual proprietors. In general, the villagers were isolated from outside world, but that inside every village private property was found, is best proved by the rules in the Smritis about boundary disputes which must have been the most common ground of litigation.

The modern law in settling boundary disputes as prevalent in the Bombay Presidency may now be considered for the sake of comparison.

If the dispute relates to boundaries of villages it shall be settled by Survey Officers or by officers nominated by the Government. They shall be guided by the following rules :

(a) (i) If the patels, village officers or their agents agree as to any given line of the boundary, common to their respective villages, the officer determining the boundary shall require the parties to execute an agreement to that effect and shall then mark the boundary in the manner agreed upon.

(ii) If the parties do not agree the survey officer shall make a formal enquiry into the matter and thereafter give his award.

(b) If any dispute arises concerning the boundaries of a field, it shall be determined by the land records, provided they afford satisfactory evidence of the boundary previously fixed and, if not, by such other evidence as may be available (119).

(c) If the several parties concerned in a boundary dispute do not agree, they may submit the settlement thereof to an arbitration committee and make an application to that effect in writing. The Officer shall require them within a fixed time to nominate a committee of not less than three persons and if such committee arrive at a decision, such decision, when confirmed by the said Officer, shall be final.

IX. IMPOTENCY. The following tests have been laid down in Narada Smriti for determining the '*impotency of a person*' :—

(Vide Narada Smriti XII. 8).—The man must undergo an examination with regard to his masculine fitness ; when the fact of his potency has been placed beyond doubt, he shall obtain the maiden (but not otherwise).

9. If his collar-bone, his knee, and his bones (in general) are strongly made, if his shoulders and his hair are (also) strongly made, if the *shape* of his neck is stout, and his thigh and his skin delicate, if his gait and his voice are vigorous. . .

10. If his semen, when thrown into water, does not swim on the surface, and if his urine is rich and foamy : by these tokens may a potent man be known ; and one impotent by the opposite characteristics.

11. According to the rules of science, fourteen species of impotent men are mentioned by the sages. They include both curable and incurable cases. The rules governing them are given in order.

12. One naturally impotent, one whose testicles have been cut out, a Pakshashandha, one who has been deprived of his potency by a curse of his spiritual guide, or by illness or by the wrath of a deity

13. One jealous, a Sevyā, one whose semen is (evanescent) as air, a Mukhebhaga, one who spills his semen, one whose semen is devoid of strength, one timorous, and one who is potent with another woman (than his wife) only, (these are the fourteen sorts of impotent persons.)

14. Among these, the first two are incurable, the one called Pakshashandha should wait for a month, the (three) named after him shall have to wait for a year.

15. Those four among whom, in the above enumeration, the one jealous comes first, shall be avoided by the wives like an outcast, though they may have been enjoyed by them.

X. MEMORIAL OF ROYAL GRANTS. Vyas quotes Yajñavalkya and Vrihaspati, who state that the king should present the land and corrody to the Brahman and have a deed of gift prepared on a piece of cotton cloth or copper plate for the attestation of the gift and for the purpose of making known for future the rules of the gift.

Thus Yajñavalkya (I. 317) observes :—

दद्याद् भूमिं निबन्धं वा कृत्वा लेख्यं तु कारयेत् ॥

आगामिभद्रपतिपरिज्ञानाय पार्थिवः ।

For the documents of royal grants, copper plates (तान्न पत्र) or cotton cloth (पट) are to be used as writing materials. The royal seal (मुद्रा) must not be omitted. The king should write down his name and those of his ancestors, the dimensions of the gift and the description of the boundary. He shall issue a permanent grant bearing the date and the signature made by his own hands.

Yajñavalkya as [I. 318-20] quoted in Mayukha observes :

पटे वा तान्नपट्टे वा स्वमुद्रोपरिचिह्नितम् ॥

अभिलेख्यात्मनो वंश्यानात्मानं च महीपतिः ।

प्रतिग्रहं परीमाणं दानच्छेदोपवर्णनम् ॥

स्वहस्तकालसम्पन्नं शासनं कारयेत् स्थिरम् ।

Besides the ordinary mode of proving documents given in Yajnavalkya there was also an additional mode to prove a royal grant. A degree of care and caution was required to be exercised. For forgery, Manu (IX. 232) prescribed a death sentence.

कूटशासनकृतं च प्रकृतीनां च दूषकान् ।
लीलात्तब्राह्मणानां च हन्याद्दिदृष्टसेविनस्तथा ॥

He quotes Prajapati's text, which lays down that a decision in respect of royal grant should be made with particular care, after inspection by the king of his own handwriting and seal, and the handwriting of the writer of the document.

कार्यो यत्नेन महता निर्णयः राजशासने ।
राज्ञां स्वहस्ततो मुद्रा लेखकाक्षर दर्शनात् ॥

[Prajapati.]

PART II. ADJECTIVE LAW

CHAPTER VII

ADJECTIVE LAW

SECTION I. INTRODUCTION

A king desirous of investigating law-cases must enter his court of justice preserving a dignified demeanour, accompanied with Brahmans and experienced councillors and decide daily, one after another, all cases which fall under the following eighteen titles of law, *strictly in conformity with the principles laid down by local usage and the institutes of the sacred law.*

The eighteen titles of law as given by our law-giver Manu were as below :—

1. non-payment of debts,
2. deposit and pledge,
3. sale without ownership,
4. concerns among partners,
5. resumption of gifts,
6. non-payment of wages,
7. non-performance of agreements,
8. rescission of sale and purchase,
9. disputes between the owner of cattle and his servants,
10. disputes regarding boundaries,
11. assault,
12. defamation,
13. theft,
14. robbery and violence,
15. adultery,
16. duties of man and wife,
17. partition of heritage,
18. gambling and betting.

These are the eighteen topics which ordinarily give rise to law suits. But if the king does not personally investigate the cases let him then appoint a learned Brahman to try them. That (Brahman) shall enter the most excellent court accompanied by three assessors and fully consider all causes brought before (the king), either sitting down or

standing (Manu VIII 1, 3—7, 9—10)

व्यवहारान् दिदृक्षुस्तु ब्राह्मणैः सह पार्थिवः ।
 मन्त्रज्ञैर्मन्त्रिभिश्चैव विनीतः प्रविशेत्सभाम् ॥
 प्रत्यह् देशदृष्टैश्च शास्त्रदृष्टैश्च हेतुभिः ।
 अष्टादशसु मार्गेषु निवद्धानि पृथक् पृथक् ॥
 तेषामाद्यमृणादानं निक्षेपोऽस्वामिविक्रयः ।
 सम्भूय च समुत्थानं दत्तस्यानपकर्म च ॥
 वेतनस्यैव चादानं सविदश्च व्यतिक्रमः ।
 क्रयविक्रयानुशयो विवादः स्वामिपालयोः ॥
 सीमाविवादधर्मश्च पारुष्ये दण्डवाचिके ।
 स्तेयञ्च साहसञ्चैव स्त्रीसंग्रहणमेव च ॥
 स्त्रीपुंघमौ विभागश्च द्युतमाह्वय एव च ।
 पदान्यष्टादशैतानि व्यवहारस्थिताविह ॥
 यदा स्वयं न कुर्यात् नृपतिः कार्यदर्शनम् ।
 तदानियुञ्जाद्विद्वांसं ब्राह्मणं कार्यदर्शने ॥
 सोऽस्य कार्याणि सम्पश्येत् सभ्यैरेव त्रिभिवृतः ।
 सभामेव प्रविश्याप्रयमासीन स्थित एव वा ॥

The eighteen titles of law mentioned by Manu, as given above, were sub-divided under one hundred and thirty heads by Narada (Ch I V. 19) Advocates were engaged in the courts of Hindu monarchs (a)

SECTION 2. HINDU PROCEDURE AT LAW

It will be an interesting study to read what Yajnavalkya has laid down about the procedure at law for suits [II. 5—11, 16—28 and 30].

स्मृत्याचारव्यपेतेन मार्गैणाधर्षितः परैः ।
 आवेदयति चेद्वाङ्मे व्यवहारपदं हि तत् ॥
 प्रत्यर्थिनो ऽप्रतो लेख्यं यथावेदितमर्थिना ।
 समाम सतर्धाहर्नामजात्यादिचिह्नितम् ॥
 भृतार्थस्योत्तरं लेख्यं पूर्वावेदकसन्निधौ ।
 ततो ऽर्थी लेखयेत्सद्यः प्रतिज्ञातार्थसाधनम् ॥

तत्सिद्धौ सिद्धिमाप्नोति विपरीतमतो ऽन्यथा ।
 चतुष्पाद्व्यवहारो ऽयं विवादेषूपदर्शितः ॥
 अभियोगमनिस्तीर्य नैनं प्रत्यभियोजयेत् ।
 अभियुक्तं च नान्येन नोक्तं विप्रकृतिं नयेत् ॥
 कुर्यात्प्रत्यभियोगं च कलहे साहस्रेषु च ।
 उभयो प्रतिभूमाह्यः समर्थः कार्यनिर्णये ॥
 निहवे भावितो दद्याद्धनं राक्षे च तत् समम् ।
 मिथ्याभियोगी द्विशुणमभियोगाद्धनं वहेत् ॥ ...
 संविधार्थं स्वतंत्रो यः साधयेद् यश्च निष्पतेत् ।
 न चाहूतो वदेत् किञ्चिद्धीनो दण्ड्यश्च स स्मृतः ॥
 साक्षिषूभयतः सत्सु साक्षिणः पूर्ववादिनः ।
 पूर्वपक्षे ऽधरीभूतेभवन्युत्तरवादिन ॥
 सपणश्चेद्विवादः स्यात्तत्र हीनंतु दापयेत् ।
 दण्डं च स्वपणं चैव धनिने धनमेव च ॥
 ह्यलं निरस्य भूतेन व्यवहारान्नयेन्नृपः ।
 भूतमप्यनुपन्यस्तं हीयते व्यवहारतः ॥
 निहृते लिखितं नैकमेकदेशविभावितः ।
 दाप्यः सर्वं नृपेणार्थं न ग्राह्यस्त्वनिवेदितः ॥
 स्मृत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः ।
 अर्थं शास्त्रात्तु बलवद्धर्मशास्त्रमिति स्थितिः ॥
 प्रमाणं लिखितं भुक्तिः साक्षिणश्चेति कीर्तितम् ।
 पञ्चमन्यतमाभावे दिद्यान्यतममुच्यते ॥
 सर्वेष्वर्थं विवादेषु बलवत्युत्तरा क्रिया ।
 आधौ प्रतिग्रहे क्रीते पूर्वा तु बलवत्तरा ॥
 पश्यतो ऽब्रुवतो हानिर्भूमेर्विशतिवार्षिकी ।
 परेण भुज्यमानाया धनस्य दशवार्षिकी ॥
 आधिसीमोपनिक्षेप जडबालधनैर्विना ।
 तथोपनिधिराजस्त्रीश्रोत्रियाणां धनैरपि ॥
 आध्यादीनां विहर्तारं धनिने दापयेन्नमः ।
 दडञ्च तत्सम राक्षे शक्यपेक्षेमथापि वा ॥

आगमो ऽभ्यधिको भोगाद्विता पूर्वक्रमागतात् ।
 आगमेऽपि बलं नैव भुक्तिःस्तोकापि यत्र नो ॥
 आगमस्तु कृतो येन सो ऽभियुक्तस्तमुद्धरेत् ।
 न तत् सुतस्तत्सुतो वा भुक्तिस्तत्र गरीयसी ॥
 नृपेणाधिकृताः पूगाः श्रेण्यो ऽथ कुलानि च ।
 पूर्वं पूर्वं गुरु क्षेयं व्यवहारविधौ नृणाम् ॥

When one who is aggrieved by others, in a manner contrary to law or usage, makes a representation to the monarch, this is a matter for a law suit.

Courts were of four kinds: (1) the chief or central court, (2) the Moot Court held in circuit in different villages, (3) the court presided over by the judge and (4) the court presided over by the king. Besides these royal courts there were also popular courts or Communistic Courts: (1) disputes among foresters were settled by foresters, (2) those among merchants by merchants, (3) those among soldiers by soldiers, (4) those among villagers and foresters by inhabitants of both places. The constituents of the Royal Courts were :

- (1) The king.
- (2) The judge or *Prad vivēka*. If under pressure of work the king was unable to try a suit himself, he was to appoint a judge to try it with the help of assessors. It was essential that the judge should be fully conversant with the law (Yajñavalkya II. 3).
- (3) Assessors: The number was to be 3, 5 or 7. They were to be endowed with learning and well-versed in law and were appointed by the king (Manu VIII. 10; Yajñavalkya II. 2). They should be Brahmans, but Kṣatriyas and Vaiśhyas could also be appointed, if they had the requisite qualifications; but Sudras could under no circumstances be appointed as assessors (Manu VIII. 20). If they were swayed by covetousness or by passions or by fear or similar influences and acted against law, they were fined—double the amount of the suit (Yaj. II. 4).
- (4) Proclaimer, Herald—*Śmṛiti* proclaimed the judgment of the court.
- (5) Computer computed the exact amount of the claims.
- (6) Writer wrote down the judgments delivered.
- (7, 8) Fire and Gold were kept in court for the purpose of ordeals.
- (9) Water was kept in court for refreshment.
- (10) Bailiff—*Sadhyapāl*—should be a Sudra; he should serve

summons, watch the parties and the witnesses.

(11) Assembly, or *Parishad*, of merchants of high families and of good character was often called by the king to watch the proceedings.

As to the mode of lodging a complaint it is laid down in the Smritis of Apastamba, Narada and Yajnavalkya that the complainant should appear before the court in all humility and state the facts constituting his grievance, and his statement would then be taken down accurately by an officer of the court called *Lekhah लेखक*. The king, or the judge, as the case may be, and the councillors may then put questions that they think proper in order to elucidate the complaint, and when they have been answered, the whole should be taken into consideration, to see whether the complaint discloses any proper cause of action: if it does, the defendant should be summoned to appear before the court by an officer of the court called *Sadhyapal, साध्यपाल*, or by issuing a summons duly framed by the court. The judge appointed by the king shall ask the complainant or the plaintiff modestly standing before him, "What is your complaint? What wrong have you suffered? From whom, how, when and why? Have no fear, speak out."

The representation as made by the plaintiff *वादी* is to be put in writing and the year, month, half month, day, names of parties, valuation and costs, *etc*, are to be given.

Written plaint or declaration is called the *Sar सार* and is, therefore, composed with particular care. The judge has the deposition of the complainant at first noted down on a black wooden slate, and then a fair copy is made on a sheet, or the plaint is written down on the floor. The plaint may be modified and improved so long as the answer is not tendered. It may be rejected, if it be contradictorily absurd, contrary to good custom or if it contains any other defect.

The plaint is subjected to a preliminary examination by the judge.

Plaint. If the complainant is half-witted or minor, the plaint may be summarily dismissed.

If the plaint is accepted, the judge shall summon the accused. According to Narada, even before the legal summons has been issued or the suit filed, the accused person may be placed under arrest by the plaintiff on appeal to the king.

When both the parties or at least their representatives are present, the procedure proper may begin which according to Yajnavalkya is divided into four parts (1) *Plaint (पूर्वपक्षवाद)* (2) *Answer or written statement (प्रतिपक्षवाद)* (3) *Trial or hearing* and (4) *Verdict or judgment*.

Hindu Law texts lay down certain characteristics of a proper

complaint, *vis.*, that the declaration of the complaint should be significant technically precise, comprehensive, unwavering, quite unequivocal, conformable to the original complaint, not opposite to well-known facts, consistent, clear, susceptible of proof, concise and yet not deficient in meaning and consistent with local and temporal conditions. An improper and false complaint was liable to rejection. An amendment was allowed at any time before the defendant had put in his reply but not afterwards.

The answer of the defendant **प्रतिवादी** to what he has heard (read) is then to be put, in the presence of him who made the first representation; and then the latter shall, at once, furnish a statement in writing in proof of and as a support of what he has asserted.

Written statement.

The answer in writing has to follow immediately only in important or urgent cases, otherwise long or short respites are allowed.

The answer in writing shall exactly correspond to the contents and the line of thought of the plaint and it must be clear and precise, and not confused or evasive. Answers were of four kinds (1) denial **मिथ्या**, (2) confession **संप्रतिपत्ति**, (3) protest or special plea **कारण** and (4) reference to a verdict in a similar case *res judicata* (**Katyayana**).

सत्यं मिथ्योत्तरकृत्रैव प्रत्यवस्कन्द्यं तथा ।

पूर्वन्याय विधिश्चैवमुत्तरं स्याच्चतुर्विधम् ॥

Provisions of written statement compared with modern Indian Law.

After the defendant had heard the plaint read out to him, his answer should be taken down, in the presence of the plaintiff. (**Yajnavalkya** II. 79).

Vishvarupa explains that the last condition is added in order to enable the court to come to an immediate decision, and must pertain only to suits of a very urgent character. This answer or rejoinder should be one that (a) traverses the plaint, (b) is reasonable or firm, (c) definite, (d) consistent and (e) not couched in difficult language. It should not be 'too lengthy.'

In criminal cases the answer should be called upon immediately after the complaint; in other cases the time for the answer may be allowed, in accordance with the wish of the parties or of the court [**Yaj.** II. 12; **Mit.** p. 280].

There are four kinds of rejoinders (1) *Admission*, the plaintiff having stated "this man owes me a hundred rupees," the defendant answers, "Yes, I do owe it" (in this case the suit ends at the second stage, (says **Apararka**) (2) *Denial* may be in four forms (a) "this is not true; I do not owe anything"; (b) "I do not know anything about it"; or "I do

not remember" (Apararka); (c) "I was not present at the place mentioned by the plaintiff"; (d) "I was not born at the time mentioned by the plaintiff." (3) *Confutation*, e. g., the defendant admits the loan but asserts that it has been re-paid and (4) *Urging a previous legal decision*, the claim that has been preferred against me by the plaintiff has already been disposed of by the previous decision of the court.

Rejoinders not fulfilling these conditions are wrong. The Mitakshara gives several examples of such wrong rejoinders, e. g., (1) *indefinite* or doubtful **संदिग्धम्** (2) *irrelevant* **प्रकृतादभ्युत्** (3) *meagre* **अत्यल्पं** (4) *excessive* **अतिभूति** (5) *touching* a part of the claim **पक्षैव देशव्यापि** (6) *confused* **व्यस्त पदं** (7) *irrelevant* regarding place, **अव्यापि** (8) *inexplicit* **निगूढार्थं** (9) *inconsistent* **आकुलं** (10) *couched* in different language **व्याहारादभ्युत्** (11) *unreasonable* **असार्थं** ।

The following are inadmissible forms of rejoinders : (1) *aprasidha*, unknown or unintelligible (2) *contradictory*, (3) *too diffusive* (4) *too brief*, (5) *doubtful*, i. e., couched in verse admitting of double meaning, (6) *impossible*, (7) *couched in difficult language*, (8) *irrelevant*, (9) *defective* (10) *inexplicit* (11) *confused* (12) *difficult* (13) *puerile* (Katyayana in Parasamadhava pp. 57-60).

The rejoinder should contain a single answer, definite and to the point. There should not be a jumble of statements (Katyayana in Mit.).

After both the parties have reduced their statements to writing and after the commencement of the trial if either party says anything not already contained in the statement, he loses the case (Katyayana).

Therefore, if the defendant does not put forward any answer he should be made to do so (Vrihaspati). 45 days are to be allowed for the defendant to set forth his rejoinder, after which, if he does not submit his rejoinder, he shall be non-suited (Manu VIII. 58).

Let not a counter-complaint be preferred until the (original) complaint is disposed of, nor let a third person (sue) him against whom a complaint is pending.

The defendant may bring a counter-plaint for abusive language, or personal trespass or for acts of atrocious violence.

Before the third part of the procedure, i. e., *trial*, begins, the judge has to decide on which party the burden of adducing proof shall lie. In general, in cases of denial the plaintiff, and in cases of protest or reference to previous verdict the defendant has to supply the proof **क्रिया** (vide Harit I. 29).

The trial is mainly based upon the deposition of witnesses. The knowledge of the witness is based on what he has seen or to occurrences at which he was present

Trial.

and what he has understood. He is primarily an eye-witness or an ear-witness, but indirect witnesses, who were instructed by direct witnesses are also known (*Vide* Narada I. 47 to 50).

The minimum number of witnesses is usually set at 3; but 2 witnesses are sufficient if they are learned Brahmins or have attested the document in question. In general, no notice shall be taken of a single witness; yet the deposition of messenger दूत, accountant, king, or chief judge may be valid, even if he is the only witness.

Later authors, such as Narada (I. 1, 3) or Yajñavalkya (II. 22) give a complete system of method of proof, namely :

(a) human proof लौकिकक्रिया, consisting of proof by means of documents and witnesses and circumstantial evidence, or by documents, witnesses and possession, or merely by documents and witnesses.

(b) Divine intervention दैविकक्रिया, by means of oaths and ordeals.

As a rule, proof by ordeal was resorted to only in default of worldly proof. Thus Yajñavalkya (II. 22) observes :—

प्रमाणं लिखितं भुक्तिः साक्षिणश्चेति कीर्तितम् ।

एवमन्यतमाभावे दिव्यान्यतममुच्यते ॥

Surety at the trial. Yajñavalkya says that a competent surety should be taken from each party for the satisfaction of the judgment

उभयोः प्रतिभूयान्ताः समर्थः कार्यनिर्णये ॥ [Ya]. II. 20

Result and consequences of proceedings. One, against whom after (a plea of) denial judgment is given, shall pay the amount (adjudged to the plaintiff) together with an equal sum to the monarch. One who makes a false complaint shall forfeit double the amount of his claim.

One who enforces by his own arbitrary act a claim which is denied, or one who absconds, or one who does not respond when called, (each of these) is considered to have failed and is liable to punishment.

When there are (rival claims, and) witnesses on both sides, the witnesses of him, who asserts the earlier title, are to be (first) examined. If that title be admitted, then the witnesses of him who claims by subsequent title, (shall be examined).

Should the suit be accompanied by a wager, (the court) shall compel the losing party to pay the fine (prescribed), as well as the wager and the debt to the creditor.

Let the monarch, rejecting subtleties, conduct the trial of suits upon merits. Even merits, in the absence of proof, cannot help a party to succeed in a suit.

If one plead a denial to a representation consisting of several matters, and one part be proved against him, the monarch shall compel him to pay the whole amount claimed ; but what has not been previously declared (by the plaintiff) is inadmissible.

If two texts of the law be opposed to each other, an argument founded on usage shall prevail, but the Dharma-shastra is of greater force than the Arthashastra. This is a settled rule.

Legal proofs are described as (1) writing (2) possession and (3) witnesses. In the absence of any one of these, it is

Trial by ordeal.

ordained that some one of the ordeals is (to be resorted to).

In all disputes where property is concerned, the last act is of greater force; except in (cases of) pledge, gift and sale, when the first act is of greater force.

If one sees his land in the possession of another and says nothing, it is lost after twenty years; movables are lost after ten years excepting pledges, boundary-limits, deposits with specification, property of idiots and children, deposits without specification, property of the monarch, of women and of those learned in the Vedas.

One who appropriates the above kinds of property beginning with 'pledges,' shall be compelled to restore to the owner his property, and to pay a fine of equal value, or according to his means, to the monarch.

Acquisition by title is stronger than by possession, unless this has come down from ancestors, but acquisition by title is of no avail without possession.

If one holding property by title have it questioned (in a court of justice), he must establish it by proof: but not so his son, nor his son's son; in their case, possession is of greater weight.

No civil action could be taken cognisance of except on a complaint.

State's intervention as to litigation.

It is directed that neither the king nor his officers should foster litigation by starting an action without a complaint and, moreover, no complaint should be taken notice of when it proceeded from a person altogether unconnected with the person aggrieved. Narada adds that a person who comes to the court with a complaint which does not concern him, without being related to the person aggrieved as brother, father, son, or duly appointed agent, should be punished. This limitation does not apply to crimes against State, for the king may and should take notice of them even without a complaint. नोत्पादयेत् स्वयं कार्यं राजा नान्यस्य पुरुषः ॥

(Manu VIII. 43) Whereas it was generally directed that neither a king nor his officers should create or foster litigation of their own accord, but

should ordinarily refuse to take cognisance of a cause of action without a complaint from the person aggrieved, cases of fraud and various other forms of crimes furnished exception to the general rule, for there it was directed that the king should take cognisance of them even without a complaint. He was also directed to employ officers to obtain information of crimes committed within his dominion and have them brought to his notice to ensure the punishment of the culprits.

कुलानि चापराधांश्च पदानि नृपतेस्तथा ।

स्वयमेतानि गृहीयात् नृपस्त्वावेदकैर्विना ॥

नृपेण विनियुक्तो यः परदोषान्ववेक्षणे ।

नृपस्य सूचयेत् ज्ञात्वा सूचकः स उदाहृतः ॥

[Pitamaha].

In Hindu Law punishment of crimes occupied a more important place than mere compensation for wrongs:—

अदण्ड्यान् दण्डयन् राजा दण्ड्यांश्चैवाप्यदण्डयन् ।

अयशो महदप्नोति नरकं चैव गच्छति ॥ [Manu VIII, 128].

Provisions
where the State
itself is to invite
proceedings.

The Mitakshara lays down that the state is to invite proceedings in the following matters :

प्रकीर्णके विषाद पदे ये विवादा राजाक्षोभजन तदाका करणादि विषयासो
नृप नृप एव तत्र स्मृत्याचार व्ययेन मार्गे वर्तमानानां प्रति कूलतायाम् स्वीय
व्यवहार निर्यायं कुर्यात् ।

(1) He who adds anything in writing to Royal grant, *Rajshasan* राजशासन or he who allows an adulterer or thief to escape.

(2) He who defiles Brahmins, Kshatriyas, Vaishyas and Sudras fearlessly.

(3) He who deals in false gold (as pure) and he who sells unclean meat.

(4) He who charges a gallant person as a thief and he who lets him (the gallant) go taking money from him.

(5) Against a man who imprecates evil against the king and culminates him or divulges his secrecy.

(6) He who sells what was on a dead body; who strikes his preceptor and he who sits with the king in carriage or throne.

(7) Who puts out both eyes of another, who performs acts forbidden by the king, or who being a Sudra lives as a Brahman.

(8) Where an unjust decision has been given by a judge or assessor सम्य.

(9) Who though justly non-suited again comes to the court,

The general rule that neither the king nor his servants should initiate the proceedings is stated by Manu.

नोत्पादयेत् स्वयं कार्यं राजा वाप्यस्य पुरुषः ।

न च प्रापितमन्येन प्रसेदर्थं कथञ्चन ॥ [Manu VIII. 43]

But texts mention the following exceptions in which the king can himself take cognisance :—

Highway robbery; interference with collection of revenue; trespassing over ramparts of the fortress; extinction of drinking fountains, arson; filling of protective ditches; disclosing of state secrets; unauthorised entrance into the king's harem, sleeping apartments, treasury and kitchen; dressing more richly than the king (Pitamaha in Virmitrodaya) Narada, as quoted by Virmitrodaya gives the following list:—

Disobedience of the king's order; killing a woman; adultery; theft; unspeakable abuse; abortion; abduction of girls; murder of Brahmans; cow-killing; and destruction of standing crops.

As the king may not himself be able to detect such crimes, he is to employ (a) detectives, and (b) spies.

The Mitakshara lays down that after a complaint has been lodged and after putting the interrogatories किं कार्यं का च ते पीडा मा मैषीर्ब्रूहि मानव । केन कस्मिन् कदा कस्मात् ॥ and after considering the replies to these interrogatories and being satisfied that the complaint is proper or one according to law, an order bearing the seal or a messenger should be sent to summon the defendant. मुद्रां वा निक्षिपेत्स्मिन् पुरुषं वा समादिशेत् ॥ Thus the Mitakshara prescribes that the defendant should be summoned to appear through an officer of the court appointed for the purpose called Sadhyapal साध्यपाल or by issuing a summons asking him to appear personally before the court. It is, however, laid down that certain persons should not be summoned to appear before the court, e.g.

अकल्पवाल स्वविर विषमस्थ क्रिया कुलान् ॥

कार्यातिपाति व्यसनि नृप कार्योत्सवाकुलान् ।

मत्तोन्मत्तप्रमत्तार्त भृत्यान्नाह्वानयेत् नृपः ॥

न हीन पक्षां युवति कुले जातां प्रसूतिकाम् ।

सर्वं वर्णोत्तमां कन्यां ता ज्ञाति प्रभुकाः स्मृताः ॥

[Vya. M p 9]

The persons who may not be summoned to appear personally before the court, meaning thereby that they may be allowed to appear through an agent are these : Persons in dangerous or miserable condition, anybody who is just about to marry or to offer a sacrifice or to

Persons exempted from Court attendance.

give alms, a cow-herd who tends his cattle, a warrior in battle and other persons engaged in pressing business,

वृक्ष पर्वतमाकृढाहस्त्यश्व रथ नौ स्थिताः ।

विषमस्थाश्च ते सर्वे नासेभ्याः कार्यं साधकैः । [Katyayana]

According to Narada quoted by Vijnaneshwara the following should not be arrested.

नदीसन्तारकान्तारदुर्वेशोपप्लवादिषु ।

आसिद्धस्तं परासेधमुक्तामन्नापराधुयात् ॥

निर्वेष्टु कामो रोगार्तो पिप्लु वयसेन स्थितः ।

अभियुक्तस्थान्येन राजकार्योद्यतस्तथाः ॥

गवां प्रचारे गोपालाः सस्यापाये कृषीवलः ।

शिल्पिनश्चापि तत्कालं मानुदभ्याश्च विप्रहे ॥^[P. V. Kano Vyavahara Mayukh p. 9.]

Women who do not observe *pardah* or prostitutes and dancing girls may be summoned, but other females may be summoned with due observance of *pardah* as required by the gravity of situation and the occasion.

तदधीन कुटुम्बिन्यः स्वैरिरियो गणिकाश्च याः ।

निष्कुला याश्च पतितास्तासामाह्वानमिष्यते ॥

कालं देशं च विज्ञाय कार्याणां च बलाबलम् ।

अकल्पपादोनपिशनैःशनैराह्वानयेत् नृपः ॥

ज्ञात्वाभियोगं येऽपिस्युर्वने प्रवजितादयः ।

तान् अपि आह्वानयेत् राजा गुरु कार्येष्वकोपयन् ॥ [Ibid p. 9.]

In important matters Vijnaneshwara states that **hermits** and the like who have retired to the woods may be summoned. Having regard to the time and place and gravity of the matter the king may cause even **अकल्प** to be brought slowly by a vehicle. A person who being duly summoned disobeys the summons without any excuse shall be fined. Besides the above two modes of summoning a defendant before the court the Mitakshara describes a somewhat peculiar procedure recognised by the Hindu Law to ensure the

Legal restraint.

attendance of a defendant. This is called **असेध्य** or *imposition of legal restraint*.

वक्तव्येऽर्थे ह्यतिष्ठन्तमुक्तामन्तं च तदुवचः ।

आसेधयेत् विवादाधीनं यावद् आह्वानदर्शनं ॥

स्थानासेधः कालकृतः प्रवासात् कर्मणस्तथा ।

चतुर्विधः स्यादासेधः तमासिद्धौ नलङ्घयेत् ॥

[V. M. p. 8.]

The power of imposing legal restraint **आसेध** is given to the plaintiff, when the debtor absconds at the time the case is about to be tried or disregards the plaintiff's words. The legal restraint is fourfold :—

(1) confinement to a place, (2) arrest for a limited time, (3) restrictions regarding travelling and (4) prohibition from a specific act

Just as in the case of summons, several persons are exempted from this **Asedha** also, *vis*, one about to marry, one oppressed by disease, one about to offer a sacrifice, one afflicted by a calamity, as also one already accused by another, and one engaged in the king's service, as also cow-herds taking care of cattle, cultivators in the act of sowing the crops, artisans while engaged in their occupations and warriors during warfare ; while there are certain other classes of persons who would not be liable to any punishment, if they transgress a legal restraint **आसेध** already imposed upon them.

The **Mitakshara** also lays down that the weak and others who are exempted shall depute their sons or some other relatives, and these relatives will not become liable for speaking without authority, quoting in support the text of **Narada** (II. 23) that :—

यो न भ्राता न च पिता न पुत्रो न नियोगकृत् ।
परार्थवादी दण्ड्यः स्यात् व्यवहारेषु विब्रुवन् ॥

(1) According to **Narada** a defendant avoiding the service of the summons or setting up a false plea may be arrested.

Arrest.

(2) In some cases as laid down in the **Mitakshara** until the legal summons has been issued or even before filing the suit, the party may place the accused under arrest by preventing him from leaving his house, undertaking a journey or religious ceremony by means of an appeal to the king for that purpose.

(3) A thief in possession of stolen articles may be arrested by detectives ; similarly, a notorious person for previous offences or if he hides in unknown places.

(4) The following may be arrested on suspicion :—

अन्ये च शङ्कया ब्राह्म जातिनामादिनिहवै ।
द्युतस्त्रीपानसक्ताश्च शुष्कमिन्नमुखस्वराः ॥
परदण्ड्यगृहाणां च पृच्छका गूढचारिणः ।
निराया व्ययवंस्तश्च विनष्टद्रव्यविक्रयाः ॥

[Yaj. II. 267.]

In the following circumstances the defendant loses his case :—

अन्यवादी क्रियाद्वेषी नोपस्थाता निरुत्तरः ॥
आहूतप्रपत्तायी च हीनः परवचनविधिस्यूतः ॥

When the plaint has been properly and correctly recorded the defendant is called upon to answer the charge laid against him. The defendant may, if necessary, obtain an adjournment for putting in his answer, but in certain specified offences he should be called upon to submit it at once. Just as the complaint is recorded in the presence of the defendant, so the answer in its turn is taken down in the presence of the complainant. An answer may assume four forms **सन्धं मिथ्योत्तरं** etc. There is no difficulty in understanding what a confession **सन्धं** and a denial **मिथ्योत्तरं** mean. A special exception **प्रत्यवस्कन्दनं** which is also called a plea of justification **कारणोत्तरं** is defined by Narada thus :

अर्थिना लिखितो योर्थः प्रत्यर्थी यदि तं तथा ।

प्रपद्य कारणं ब्रूयात् प्रत्यवस्कन्दनं स्मृतम् ॥

"Where the defendant admits the allegations recorded by the plaintiff as true, but urges reasons (in denial of the liability), the plea taken is called a "*special exception*." Thus virtually it amounts to what may be called a plea of confession and avoidance inasmuch as here the defendant admits at least partially, if not wholly, the claims made by the plaintiff, but at the same time introduces additional facts and brings forward reasons why the plaintiff's case should fail. A plea of *res judicata* has been defined by Harita thus :—"When the defendant

Res judicata. avers that the matter in controversy was the subject of a formal litigation between him and the plaintiff where the latter was defeated, the plea is a plea of former judgment (or *res judicata*)."

अस्मिन्नर्थे समानेन वादः पूर्वमभूत्तदा ।

जितोऽयमिति चेद् ब्रूयात् प्राङ्म्यायः स्यात् तदुत्तरम् ॥

The following five persons lose their case :—(1) a person setting up a new case after it has been recorded in one way ; (2) a person who evidences his aversion to the trial by refusing to help its progress ; (3) a person who fails to appear at the time of the trial ; (4) a person who being called upon to answer keeps silent, and lastly (5) a person who absconds with a view to avoid process of the court.

When both the parties have adduced their evidence, it becomes the duty of the court to deliberate and decide which party should succeed. On such deliberations the judgment follows, embodying the decision of the court ; the winning party then obtains what has been called **जयपत्र** or decree. This document embodies a summary of the pleadings, of the evidence

adduced by the parties and of the court's deliberations as well as of the law applicable to the case, as determined by the court (See Vyasa's text above). It bears the signature of the judge and the royal seal.

That is, if the plaintiff succeeds in establishing his proof, he succeeds in his suit and obtains the decree. If, on the other hand he fails in establishing his proof, his suit fails.

तत्सिद्धौ सिद्धिमाप्नोति विपरीतमतोऽन्यथा ।

[Yaj. II. 89]

Decisions have been classified under four heads :

(1) *Based* on righteousness when the defendant has righteously admitted the claim, and which has been further ratified by means of ordeals.

(2) *Based* on legal proceedings, *i.e.*, upon evidence and counter evidence produced during a regular trial.

(3) *Based on arguments*, dealing with facts of possession, custom, and so forth.

(4) *Based on royal command*, in a case where the evidence by both the parties has been found to be of equal force, and the court has been unable to come to a decision. But such royal command should not violate the law or the integrity of the members of the court (*Vrihaspati*).

After pronouncement of the judgment, the property under dispute shall be handed over to the winning party along with the court's decree in writing (*Katyayana*).

According to Vishnu, the king is to receive one-tenth part of the claim from the debtor as fine and the 20th part from the creditor, this latter sum being meant for the maintenance of the court.

When the plaintiff has claimed a number of things such as gold, silver, clothes and so forth and the claim is denied in toto by the defendant in the course of the trial, and further if the plaintiff is able to establish by the evidence he adduces his claim of only a few of the things claimed, the defendant should be made to pay the entire claim, that is, all the things mentioned in the plaint along with a fine, adds *Visvarupa* (Yaj. II. 20) :

निहृते लिखितं नैकमेकदेशविभावितः ।

दाप्यः सर्वं नृपेणार्थं न प्राह्यस्त्वनिवेदितः ॥

In a case where the plaintiff after having proved his claim adds that the defendant owes him a few more things which he had forgotten to include in his claim, this additional claim cannot be decreed in his favour (Yaj.). This principle is similar to the provisions of the modern Civil Procedure Code, Order 2, rule 2.

The debtor who has denied the debt or the man who has made a false claim should be fined double the amount of the claim (Manu VIII. 59).

If the judgment-debtor is unable to pay the amount due, he shall repay the creditor by working for him (Manu VIII. 177).

But the Brahman debtor is to be allowed to repay by easy instalments (Manu VIII. 177; IX. 229).

If the man is incapable of doing work, he should be put in prison (Manu IX. 22).

After the production of evidence, both oral and documentary, as stated above the verdict निर्णय has to be drawn up in writing and this deed is called जयपत्र which contains the plaint, answer and the main parts of the proceedings together with the signature of the king or judge and the royal seal, to be handed over to the successful party.

Questions of execution could rarely arise, for generally both the parties had to give sufficient securities, otherwise the court's servants took them in custody and the object of the dispute was also taken care of by *Sadhyapa* साध्यपाल, as Yajnavalkya (II. 10) observes :

कुर्यात् प्रत्यभियोगं च कलहे साहसेषु च ।
उभयोः प्रतिभूः ग्राह्यः समर्थः कार्यनिर्णये ॥

Duty of enforcing judgment was entrusted to the lower officials of the State, while execution in criminal cases was entrusted to a Chandal. Yet self-help was allowed in the largest measure in recognised claims for which ऋणप्रकरणम् and व्याज were practised by the creditor. The usual method was, as expressed in Marathi धनिको घरणे बसणे बसण, to fast himself at the door or to threaten that he will kill himself or his son by *Abhijait* अभिजेत.

धर्मेण व्यवहारेण छुलेनावरितेन च ।
प्रयुक्तं स्यादमेतदर्थं पञ्चमेन बलेन च ।

Courts. Yajnavalkya has clearly laid down that there were two classes of courts, State and Popular.

I. The State Courts were :—

(1) The Court of the sovereign, who was assisted by learned Brahmans as assessors. It was ambulatory, being held at the place where the king lived.

व्यवहाराक्षरूपः पश्येत् विद्वद्भिः ब्राह्मणैः सह ।
धर्मशास्त्रानुसारेण क्रोधलोभविवर्जितः ।

[Yaj. II. 1.]

भुताभ्ययनसंपन्ना धर्मज्ञाः सत्यवादिनः ।
राज्ञा सभासदः कार्यार्थं रिपौ मित्रे च ये समाः ॥

(2) The tribunal of the chief judge appointed by the sovereign and sitting with three or more assessors, not exceeding seven. This was a stationary court, being held at an appointed place.

(3) Inferior judges appointed by the sovereign's authority for local jurisdictions; from their decisions appeal lay to the court of the chief judge, and thence to the king in person.

अपश्यता कार्यवशात् व्यवहारान् नृपेण तु ।
सभ्यैः सह नियुक्तव्यो ब्राह्मणः सर्वधर्मविद् ॥ [Ya. II. 3]
रागास्तोभाद्भयाद्वापि स्तुत्यपेतादिकारिणः ।
सभ्याः पृथक् पृथक् दण्ड्याः विवादात् द्विगुणं दमम् ॥ [Ya. II. 4]

II. Popular Courts.

(1) Assemblies of townsmen or meetings of persons belonging to various tribes and following different professions but inhabiting the same place.

(2) Companies of traders or artisans, conventions of persons belonging to different tribes, but subsisting by the same profession.

(3) Meetings of kinsmen, or assemblies of relations.

The technical terms in the Hindu Law books for these three gradations of assemblies are (1) पूग Puga (2) श्रेणी Sreni (3) कुल Kula.

From the above description it would be clear that certain cases were filed in the State's courts, because under the rigid caste system public opinion would be strongly against questioning the decision of popular courts, and therefore, juridical knowledge was not an absolute necessity.

Appellate Jurisdiction. Successive appeals were allowed from a lower court to the court superior to it and the highest court of appeal was the king.

नारदेन पुनर्नृपोपि कृतैः निर्णीतेऽपि व्यवहारे ।
नृप गमनं भवतीत्युक्तम् ॥ [Mit.]
कुलानि श्रेण्यश्चैव पूगांश्च अधिकृतो नृपः ।
प्रतिष्ठा व्यवहाराणां गुर्वेषामुत्तरोत्तरम् ॥ [Narada]

For instance, appeals were allowed to be preferred by class Kula to Sreni and by Sreni to Puga and finally to the king's judge or to

the king in person, as Yajñavalkya observes :

नृपेणाधिकृताः पूगाः श्रेणयोऽथ कुलानि च ।

पूर्वं पूर्वं गुरु ह्येवं व्यवहारविधौ नृणाम् ॥

[Yaj. II 30.]

The grounds on which appeals were allowed :—

When a decision was opposed to Smṛiti and was given through partiality, avarice or fear.

रागात्लोभात् भयात् वापि स्मृत्यपेतादिकारिणः ।

सभ्याः पृथक् पृथक् दण्ड्याः विवादात् द्विगुणं दमम् ॥

Hence it would seem that appeals could be maintained if (a) the decision was contrary to law (स्मृति) and was given through partiality, avarice or fear or (b) if it was contrary to usages स्मृत्यपेतादि.

But if the appellant lost the appeal, he was to pay heavy fines—double the amount of the suit. (c) He who thought that the verdict given against him was unjust might demand retrial or review but must agree to pay double the amount decreed by the first court as fine in case of defeat.

This point will be made more clear if we quote the text :—

यो मन्यते जितोऽस्मीति न्यायेनापि पराजितः ।

तमायान्तं पुनर्जित्वा दापयेत् द्विगुणं धनम् ॥

Narada also observes :

तीरिते यानुमिष्ट्वा यो मन्येत विधर्मतः ।

द्विगुणं दण्डमास्थाय तत्कार्यं पुनरुद्दरेत् ॥

नृपेणाधिकृताः पूगाः श्रेणयोऽथ कुलानि च ।

पूर्वं पूर्वं गुरु ह्येवं व्यवहारविधौ नृणाम् ॥

[Yaj. II 30.]

The above verse also contains procedure of appeals, *vis.*, that in dealing with law suits, judges appointed by the king wielded more authority than village communities, which in turn possessed more power than trade guilds, and the latter were treated superior to families (or according to Aprarakra, agriculturists).

The Mitakshara explains the meaning of the verse thus:

"In the case of a suit decided by officers appointed by the king there would be fresh hearing of the *Prajas*, *etc.*, on the ground of a wrong exercise of judgment, even if the defeated party is dissatisfied. Similarly in the case of the suit decided by *Puga* there will be no appeal to *Sreni*, *etc.* So on decision by the *Sreni* there can be no resort to the *Kula*, *etc.* But on the decision of the *Kula*, one may go to the *Sreni* *etc.*, from the decision of the *Sreni* to the *Puga* and from the judgment of the *Puga* to the officers appointed by the king. "But

even a decision of the superior court could be re-opened in the following cases :

बलोपधिविनिर्बृत्तान् व्यवहारान् निवर्तयेत् ।

स्त्रीनक्तमन्तरागार बहिः शत्रुकृतांस्तथा ॥ [Ya] II. 32.]

मत्सोन्मत्तात् व्यसनिबालभीतादियोजितः ।

असंवद्ध कृतश्चैव व्यवहारो न सिध्यति ॥ [Ya] II. 32.]

तत्र च नृप गमने सोत्तरस्थेन राज्ञा पूर्वं सभ्यैः सहकृण्वन् व्यवहारे निर्णयमाने यद्यसौ कुदृष्टिवादी पराजितः सदासौ दण्ड्यः । अथासौ जयति तदाधि कृताः सभ्याः दण्ड्याः [Mit.]

A decision obtained by false evidence was liable to be set aside on review. Similarly a decision obtained by force or fraud could be reversed on proof that it was so obtained. So also a litigation with a woman or with persons not in a sound state of mind by reason of intoxication, insanity, disease, extreme distress, infancy or intimidation was void and did not produce any binding effect. A trial held during night or within closed doors or outside the jurisdiction was void and liable to be annulled. Review could also be allowed if the evidence tendered or judgment given proved to be false, or if the procedure was conducted at night or outside the proper place, or in the interior of the house or if it was caused by the enemy or if it was decided by the application of force or treachery or if it was decided by incompetent men, or without hearing the witnesses or if it was begun by some person incapable of doing the business or by a person who was not fit for it (*vide* : Narada and Vishnu). Yajnavalkya also observes :

बलोपधि विनिर्बृत्तान् व्यवहारान् निवर्तयेत् ।

स्त्रीनक्तमन्तरागार बहिः शत्रुकृतांस्तथा ॥

According to Narada (I. i 62) under certain circumstances the discovery of new and important evidence which even by use of reasonable diligence could not be produced by the party at the proper time may cause renewal of procedure, although as a general rule evidence which was not produced at the right time was of no use.

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BOOK II
M I M A N S A
RULES OF INTERPRETATION

**THE
MIMANSA
RULES OF INTERPRETATION**

BY
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CHAPTER I

INTRODUCTION



SECTION I. PRELIMINARY

Mimansa मीमांसा.—Its root is मान् पूजायाम् and its Sutra as given by Panini पाणिनि is मानेर्जिज्ञासायाम् (सन् प्रत्ययः) । So the meaning of the term Mimansa is जिज्ञासा पदस्य विचारे लक्षणः । Jijnasa means 'desire to know' ; the inevitable result of the desire would be विचार or thought. The question arises as to what should be thought of, or what knowledge is to be acquired ? The answer is : *Dharma*. Dharma has been defined to be यागादिरेव धर्मः, that is, Yajna is our Dharma as described in the Vedas. Mimansa Shastra, therefore, means the rules and principles conducive to the search of the knowledge of Dharma, or in other words, the principles of the interpretation of the Vedas.

The Mimansa Rules of Interpretation, or the Rules of Interpretation in Hindu Law with special reference to Mimansa aphorisms (as applied to Hindu Law) will be dealt with in this Book. Rules of interpretation possess an importance of their own in Hindu Law, greater than found in the law of any other country, as is evident from Kulluka's commentary on Sloka 1, Ch. I. विरोधिवौद्वादितकैर्न हन्तव्यानि अनुकुलस्तु मीमांसादितर्कः प्रवर्तनीय एव, and also from that of Medhatithi on Sloka 1. Ch. II. एतच्च मीमांसातस्तत्त्वतो निश्चीयते, that spirit and essence of the Mimansa should be adhered to though contrary to Buddhistic principles. The proper way of expounding Manu's Smṛiti and the rest is by applying the Mimansa rules interpreting them, and not the iconoclastic rules of the free-thinkers. Hindu Law has always been attached to its rules of interpretation.

In case of dependence of law on State, the supreme authority of the State prevails either in the form of legislation or in that of the pronouncement of judges having ultimate jurisdiction. But when the law is deduced and derived from religious works, to whose authority people implicitly submit, and when the administration of law is entrusted to men learned in religious books, as in the case of Hindu Law, the necessity of fixed rules of interpretation arises as a matter of course,

and assumes a very great importance. State-made law can change with the times, but not so the canonical law like the one we are dealing with. In this case the words of law remain unchanged for all time to come and may either stand in the way of social growth or may themselves become out of date with the growth of ideas and development of new situations in a growing society. The Hindu law-givers foresaw the dangers both of a static law as also of ever-changing enactments. They struck a mean between the two by laying down elastic rules of interpretation to meet the exigencies of all times and occasions, and thus provided for automatic evolution of law with the progress of society.

The subject of interpretation of law does not occupy so important a place among modern jurists as it did amongst the Hindu jurists in ancient days, though it has always been an important branch of what is called the "adjective law." The courts have to deal with three things: (1) laws dealing with rights and liabilities, (2) facts which establish such rights and liabilities in particular cases, and (3) the machinery of administering the law and of ascertaining facts. The last one is of an incidental character, and nothing particular may be said about it. The second mostly concerns the parties claiming a right or imposing a liability, and the law of Evidence would assist the courts in the performance of their duties. Thus the most important function of the administration of justice lies in the ascertainment of rights or liabilities and in dealing with the substantive law of the State, thus making it imperative to invoke the aid of the law of interpretation. So, this subject stands side by side with the rules of evidence and procedure. But no importance has been attached to this difficult branch of law—Mimamsa. It may be said that judges know how to interpret the law, but this may be equally said of the rules of evidence and procedure. There is no doubt that a well-trained judge may arrive at a proper construction of a text of law without the help of any formal rule of interpretation. But this does not imply that rules of interpretation are unnecessary.

The interpretation of Hindu Law is beset with serious and numerous difficulties. Judges not familiar with Hindu thoughts and imbued with foreign ideas of jurisprudence not unoften err in the application of these principles. The existence of a mass of precedents based on alien principles of jurisprudence creates another difficulty. The neglect of Sanskrit study and research, which alone can bring to light the correct rules of interpretation to be applied to Hindu Law has caused still a third difficulty.

**Observations
of: (1) Sir John
Edge, C. J.**

The following observation of Sir John Edge on this subject is noteworthy:—

"The question is how is the text of Vashishtha to be construed. It must clearly be construed according to the rules for the construction of the texts of the sacred books of the Hindu Law, if authoritative rules on the subject exist. That rules for the construction of sacred texts and law of the Hindus do exist cannot be disputed, although those rules have been frequently overlooked or not referred to by judges or English text writers, probably because they are in Sanskrit and have, so far as I am aware, not yet been translated. That they are rules of the highest authority is obvious from the manner in which they have been referred to by Mr. Colebrooke." (a)

The following passage from Colebrooke's *Miscellaneous Essays* [Vol. I, p. 342] shows the importance he attached to the *Mimansa* Aphorisms for the interpretation of Hindu Law:—

"A case is proposed either specified in Jaimini's text or supplied by his *scholiasts*. Upon this a doubt or question is raised, and a solution of it is suggested, which is refuted and a right conclusion established in its stead. The disquisitions of the *Mimansa* bear, therefore, a certain resemblance to judicial questions; and, in fact, the Hindu Law being blended with the religion of the people, the same modes of reasoning are applicable, and are applied to the one as to the other. *The logic of the Mimansa is the logic of the law*—the rule of interpretation of civil and religious ordinances. Each case is examined and determined upon general principles; and from the cases decided the principles may be collected. A well-ordered arrangement of them would constitute the philosophy of the law, and this is, in truth, that has been attempted in the *Mimansa*."

(3) Prof. Max Muller. Professor Max Muller in his learned treatise on the Six Systems of Indian Philosophy observes as regards the *Mimansa* Shastras:

"We may wonder why *Purva-Mimansa* should ever have been raised to the rank of a philosophical system by the side of the *Uttara-Mimansa* or the *Vedanta*, but it is its method rather than the matter to which it applied that seems to have invested it with a certain importance. This *Mimansa* method of discussing questions has been adopted in other branches of learning also, for instance, by the highest legal authorities, in trying to settle contested questions of law. We meet with it in other systems of philosophy also as the recognised method of discussing various opinions before arriving at a final conclusion."

In the translation of Artha Sangraha, Dr. (4) Dr. Thibaut. Thibaut in his Introduction observes as follows:—

"The Mimansa certainly deserves greater attention than it has hitherto received. It has indeed none of the attractions which the other Darsanas derive from the speculative character of their contents; its scope is limited and the nature of the investigations in which it is engaged leaves no room for high flights of imagination. But it possesses counterbalancing advantages. Its subject-matter is of a positive nature, its method is sound and its reasoning in most cases convincing."

Mimansa rules generally occur incidentally with reference to the treatment of substantive law on the lines adopted by particular writers. They mostly bear on isolated points and are not of much general interest or utility. But they sometimes purport expressly to be the reproduction of some one or other of the Mimansa principles of interpretation.

Therefore, the Mimansa Principles of Interpretation which form a systematic code of rules on the subject of interpretation with special reference to the Mimansa aphorisms, are of immense benefit for the study of Hindu Law. It is very difficult to modernise the effect and purpose of the aphorisms which came into existence in the earliest times when the present modern principles of interpretation were unknown. Savaraswami and Kumarila Bhatta, the great commentators on Aphorisms would have made this task easier, had they not confined the subject mostly to the religious and metaphysical questions arising out of the subject interpreted by Jaimini. The latter and more recent commentators, such as, Langakshi Bhaskar and Apadeva have been greatly useful in modernising this subject.

A distinction has been made between the elementary rules in the nature of axioms as contradistinguished from the nature of axioms and the principles of construction. rules (and principles, more or less of a complex character. Mimansa writers have called the former as axioms of interpretation and the latter as general principles of interpretation. Another distinction has also been observed in the application of texts, that is, whether a given text is intended to lay down a positive rule of law or a rule of discretion; to what persons or classes of persons it would apply; how it would bear on other texts and how it should be modified when so bearing on other texts, as distinguished from the interpretation of texts, and how the meaning and the force of the words of a text are to be made out. The former is a matter which is more or less extraneous to the text, showing how and for what

purposes the text is intended to be applied.

These distinctions are not observed in the modern system of the law of interpretation. In every country there is a class of law springing from customs and usages, sometimes called the Common Law. In Hindu Law the Smritis are regarded as such, while the law itself is contained in the Vedas. Additional rules of interpretation are, therefore, essential for the construction of this class of law, *viz.*, the Smritis which is the main body of Hindu Law, if not the sole body. The Mimansakas have, therefore, formulated a number of general rules for the interpretation of the Smritis and the Hindu Law of usage besides their rules for the interpretation of the Vedic law.

The Mimansa Nyayas or the specific principles of Mimansa called Nyayas have also been fully discussed by our Mimansakas. Nyayas or Maxims are in some cases equivalent to the head-notes of a case, containing the result of a discussion, for and against, on a given point. In other cases they are either the current expression of a happy humour or of a thoughtful conclusion called Laukika Nyayas or popular maxims. They may relate to different purposes—to the meaning of words or sentences in general or to negative texts, known as Vidhis. A distinction has been made between Pratishedha from which arise considerations of contradiction, and Paryudasa giving rise to provisos and exceptions. Badha is a particular form of contradiction. It explains one text nullifying another. The cases of conflict between the letters of the Smriti law and the Arthashastra have also been clearly dealt with.

The history of the successive development and the vicissitudes through which the Hindu Law had to pass, shows that the duty of interpreting it was always in the hands of learned Brahmans, well-versed in law and Mimansa. The law was always independent of the State. Even during the Muslim rule or the present British Government it retained, more or less, its independent character. So the Mimansa rules have never been a dead letter.

The Mimansa Rules of Interpretation like every other branch of knowledge among the Hindus, owe their origin and development to the study of the Vedas; the Kalpa and Nirukta dealt with the questions of interpretation. The Kalpa Sutras, also known as the Prayoga Sutras (rules of application), serve mostly as the rules of interpretation, such as the Sutras of Ashvalayana, Apastamba and others. Jaimini, the author of the Mimansa aphorisms, does not admit their authority and takes exception to them on the ground "that they have no system in them,"

Mimansa Nyayas or maxims.

Mimansa rules never a dead letter.

Vedic origin of the subject.

असन्नियमात् (I. iii, 12) and further that they are not the sequence of Srutivakyas (Vedic propositions) अवाक्यशेषात् (I. iii, 13).

The Mimansa system of interpreting the Vedas is not like Hermeneutics, the system of interpreting the Bible as adopted by Christian Theologists. The difference is this : The interpreters of the Bible do not so much look to its words for interpretation as to the supreme moral force from which they proceeded. They go beyond the actual words to elicit their meaning and purpose. The Mimansakas, on the other hand, start with the words, and then follow up the consequences. The Mimansa system is thus the mode of the study of judicial principles of interpretation.

Mimansa different from Hermeneutics but identical with judicial principles of interpretation.

The book which is now regarded as an authority on the law of interpretation is that of Sir Peter Benson Maxwell. It shows that much work has to be done before the subject can assume a systematic scientific shape.

Modern treatment of the subject.

The following is the opening section of this work : "A statute is the Will of the Legislature ; and the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded 'according to the intent of them that made it.' The object of all interpretation of it is to determine what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it. When the intention is expressed, the task is of verbal construction only ; but when the statute expresses no intention on a question to which it gives rise, and yet some intention must necessarily be imputed to the Legislature regarding it, the interpreter has to determine it by inference grounded on certain legal principles. The act, for instance, which imposes a penalty, recoverable summarily on every tradesman, labourer or another person who carries on his worldly calling on a Sunday, would give rise to a question of the former kind, when it had to be determined whether the class of persons to which the accused belonged was comprised in the prohibition. But two other questions arise out of the prohibition : is the offender indictable as well as punishable summarily ? And is the validity of a contract entered into in contravention of the Act, affected by it ? On these corollaries or necessary inferences from its enactment, the Legislature, though silent, must nevertheless be held to have entertained some intention, and the interpreter is bound to determine what it was."

"The subject of the interpretation of a statute seems thus to fall under two general heads : what are the principles which govern the construction of the language of an Act of Parliament; and next, what are those which guide the interpreter in gathering the intention on those incidental points on which the Legislature is necessarily presumed to have entertained one, but on which it has not expressed any."

Two cardinal questions.

The two questions above referred to may be summed up thus :

(1) What is the meaning and sense of a particular word, sentence or passage in a book of law as intended by the Legislature ?

(2) Whether it constitutes an obligatory side, a quasi-obligatory rule, or a non-obligatory matter in cases where the intention and meaning are not sufficiently explicit.

Maxwell first of all treats with what is called the *Literal Construction*. He explains it thus :

"The first and most elementary rule of Construction is that it is to be assumed that the words and phrases are used in their technical meaning, if they have acquired one, and in their popular meaning, if they have not, and that the phrases and sentences are to be construed according to the rules of grammar ; and from this presumption it is not allowable to depart where the language admits of no other meaning ; nor where it is susceptible of another meaning, unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the Legislature. If there is nothing to modify, nothing to alter, nothing to qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences."

The following four guiding principles can, therefore, be deduced :—

Four principles deduced.

I. That the words and sentences of a statute must be construed in their natural and ordinary meaning, unless there be something to modify, to alter or to qualify that meaning.

II. That the natural and ordinary meaning is the popular meaning, unless the word or phrase has acquired a technical meaning thoroughly understood by those conversant with the subject.

III. That phrases and sentences must conform to the rules of grammar for their interpretation.

IV. That only when adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal construction, for

concluding that the ordinary and natural meaning does not give the real intention of the Legislature, that meaning may be departed from.

The equivalents or the counterparts of these four rules do exist in our Mimansa Shastra and are called (1) principle of the *Sruti*, (2) that of *Linga*, (3) that of *Vakya* and (4) that of *Prakarana* (Jaimini III. iii. 14).

Similar rules in the Mimansa Shastra.

(1) The **principle of the Sruti** is that when a sentence is complete and explicit in sense and grammar, no attempt should be made to strain or twist its meaning.

(2) The **principle of Linga** is that when a word or expression has more than one meaning, and the natural or ordinary meaning of a word or expression does not harmonize with the text, its technical sense is to be determined by the context or by reference to other parts of the subject.

(3) The **principle of Vakya** is that where words and sentences are not connected in an explicit manner, they should be joined grammatically, so as to make a sensible proposition.

(4) The **principle of Prakarana** is that when a sentence or clause makes no complete sense by itself, however clear its meaning and grammatical composition might be, it should be read into or with some other passage with which it coalesces according to the nature of the whole subject.

Maxwell has, therefore, broken no new ground, and the rules contained in his book are all to be found in the Mimansa Shastra. These general rules will not be of much use unless accompanied by illustrative cases. Importance is all the more enhanced because of the fact that it is very difficult in doubtful cases to distinguish whether the circumstances of a passage justify the one or any other mode of interpretation as given above. The Mimansa gives illustrative cases also and they are called **Nyayas** or **Adhikaranas**. The English system of construction also deals with illustrative cases, which are the main objects and functions of the law of construction.

Necessity of illustrative cases.

Axioms.

Besides illustrative cases, which play a very prominent part in the law of interpretation, certain principles of an elementary or axiomatic character affecting interpretation are also of much importance. One of them is that a law-maker can never use a word or sentence without any purpose or meaning, so it is laid down that "A statute ought to be so construed, that if it can be prevented, no

Presumption against superfluity.

clause, sentence or word shall be superfluous, void or insignificant." Thus superfluity can not be deemed to exist. The

corresponding rule exists in the Mimansa called **Anarthakya** (attributing meaninglessness).

Another axiom which is of general importance is that contradictions should not be too easily assumed, and the interpretation should harmonize one provision with another. The Mimansa writers hold that in case of a direct and clear conflict between two texts, the result is that the binding effect of both is neutralised, and one is left to accept either at one's option (**Vikalpa**). Such a disastrous result should not be allowed, if there be any means left open to reconcile the texts.

SECTION 2. APPLICATION OF MIMANSA RULES TO THE POSITIVE SMRITI LAW

The main portion of the rules of interpretation is contained in the Mimansa Sutras. Their commentators were not lawyers, and they generally applied those Sutras to solve difficulties presented by the sacred law—the Vedas. So their works have the resemblance of religious treatises. The rules and principles of interpretation laid down in the Sutras are like the rules of grammar. As the rules of grammar when applied to a poetical work do not lose their force when applied to prose, so the rules of interpretation applied to the Vedas would not become of less import by applying them to questions of civil law. In fact they have a dual aspect.

The following passage from Thibaut's Introduction to the translation of the Artha Samgraha shows the difficult nature of the Mimansa rules as well as of their interpretation :

“ The fact that throughout the Mantras accompanying a certain sacrifice are combined in separate sections apart from those chapters which contain the corresponding Brahmana, is in itself a source of frequent perplexity. Again it often happens that there is an apparent contradiction between two passages referring to the same matter, as when, for instance, the Brahmana-passages maintain that from out of a series of sacrificial acts a certain one is to be performed in the sixth place, while in the section which contains the Mantras accompanying the series of acts the Mantra referring to the particular act mentioned occupies the tenth place.—Or again we find that, of two actions referring to the same thing, the one which according to the exigencies of the case must be performed in the second place is in the sacred text enjoined before the other one.—Or again the reader of the Veda may be in doubt as to whom a certain injunction contained in the Veda is addressed, what kind of man, in other words, is entitled to perform the sacrifice enjoined and in return to expect the result promised in the Veda.—Or

again we meet in the Veda with passages regarding which a *prima facie* doubt arises whether they enjoin an independent sacrifice to be performed from a special motive and attended by a special result or perhaps merely a subordinate sacrificial act which contributes its limited share towards the successful performance of one of the well-known great sacrifices.—Or again—and this must have been a point whose consideration very frequently pressed itself on the Brahmins at a time when the various sacrifices mentioned in the Veda were in reality regularly performed—it becomes a matter for reflection and doubt in what manner one has to perform the very numerous so-called Vikritis, *i. e.*, the sacrifices which are mere modifications of the few typical sacrifices and which as such the Veda does not describe in detail.—It would be useless here to continue the enumeration of difficult cases of this nature.”

The distinguished Hindu lawyers, one and all, make use of the principles and rules of the Mimamsa Shastra in dealing with their subjects. They treat these rules as authoritative in settling disputed points and in supporting their conclusions. The ways in which they apply the Mimamsa maxims show how those maxims, though directed to interpret the Vedic texts, fully apply to the texts of law contained in the Smritis. These matters will be taken up in detail hereafter. At present it may be said that Vijnaneshwara, the author of the Mitakshara, made clear the fundamental principle of his work, *vis.*, the principle that property is temporal by making use of Jaimini's Sutras. Jimutavahana, the author of the Dayabhaga follows the Mimamsa principles in discussing the fundamental doctrine of his work, regarding the absolute disposing power of the father or a co-parcener over property possessed by him. Nilkantha, the author of the Vyavahara Mayukha, while discussing whether the king has any right of property in the lands forming his territory, strongly held that he had none on the basis of the *Sarvadakshina* maxim of Mimamsa. Medhatithi's commentary of Manu, which is one of the principal factors in developing the jurisprudence of India abounds, more than any other law-book, in Mimamsa terms and dissertations. Kulluka, the famous commentator of Manu whose work is characterised by Sir W. Jones as the 'shortest, yet the most luminous, the deepest, yet the most agreeable commentary ever composed by any author ancient or modern, European or Asiatic,' disapproves the method of interpreting the sacred text in the light of the iconoclastic reasonings of the Buddhists and the like, and says that the approved method of interpretation is to follow the Mimamsa principles. There is also a

**Distinguished
Hindu lawyers'
judicial applica-
tion of Mimamsa.**

passage in Mahabharata :

"The Puranas, Manava Dharma, the Vedas with Angas and the Medical Science, these four are established by the authority of command and are not to be upset by the authority of reasoning."

पुण्यं मानवो धर्मः साङ्गोवेदाश्चिकित्सितः ।

आज्ञासिद्धानि चत्वारि न हन्तव्यानि हेतुभिः ॥

Kulluka remarks as to the meaning of this passage : विरोधि
वौद्धादितर्कैर्न हन्तव्यानि, अनुकुलस्तु मीमांसादितर्कः प्रवर्त्तनीय एव ।

Raghunandana's works on Smrititattva, such as, Ekadashitattva, Malamasatattva, Suddhitattva, Udbhavatattva, etc., are full of Mimansa references. Apastamba and Baudhayana have also made use of Mimansa principles, specially in connection with giving the eldest son a larger share of the inheritance, which was a question on which they differed, though they referred to the same Sruti. Vashishtha and Yajnavalkya also have made a mention of the Mimansa rules at numerous places.

SECTION 3. MIMANSA PHILOSOPHY AND MIMANSA LITERATURE

The philosophy of the Mimansakas is nothing but the philosophy of words as contained in Sutra 5: "Eternal is the concomitancy between the word (of command) and its purpose. The means of knowing this eternal concomitancy is the teaching (revelation) which is unfailing in leading to transcendental effects (eternal bliss) and is irrespective of anything else as Badarayana has mentioned it." This Sutra has been construed differently by two schools. One is the conservative school of Savara Swami, Kumarila and others, while the other is the rational school of Guru Prabhakar. The treatment of the former is too abstruse to follow, while that of the latter as explained in Prakarana Panchika by Kalinath Misra is easy and interesting. Prabhakar explains that a word is the embodiment of the impress of a will power directed to a particular purpose; so the word conveys the purpose as its necessary concomitant. 'In the case of the fluctuating will of man, the purpose or the meaning of words may vary. But in the case of the Eternal Will impressed upon the words of the Vedas, the words convey eternal truths producing transcendental effects. This is the philosophy proper of the Mimansakas. But it is often extended to the Metaphysics of Karma, which means that there is an unfailing sequence of deeds.'

(*) Some attribute an atheistic character to the Mimansa philosophy,

(*) Kishori Lal Sarkar's Mimansa Rules of Interpretation, 508.

but the fact that a belief in the existence of a supreme power is the backbone of both the schools belies the presumption.

Some form of expression is essential for the conception of a definite idea or thought in the mind to communicate it and to make it realistic. So the first impression in the Supreme Mind regarding this Universe would be: "The Word is Brahma." The same conception is to be found in the Bible: "In the beginning was the Word, the Word was with God, the Word was God." 'The Mimamsakas say that Devatas (gods) expressed by such words as Agni, Marut, Varuna *etc.*, were not existing personal deities to whom these names were given, but that they come into existence with the application of the will force (Mantra) embodied in the words, for will force embodied in words generates existence. The Law of Karma is understood in the light of the same principle of faith. Will power as embodied in a particular deed never exhausts itself. It transmigrates from the shape of one action into another, until there is salvation by Sadhana (religious purification).' (p. 509).

Mimansa literature.

Dr. Ballantyne's observation on the Sutra literature may appropriately be cited here :—

"The great body of Hindu Philosophy is based upon six sets of very concise Aphorisms. Without a commentary the Aphorisms are scarcely intelligible, they being designed not so much to communicate the doctrine of the particular school as to aid, by the briefest possible suggestions, the memory of him to whom the doctrine shall have been already communicated. To this end they are admirably adopted; and, this being their end, the obscurity which must needs attach to them in the eyes of the uninstructed, is not chargeable upon them as a fault."

Some of the Sutras may be unintelligible without the aid of the commentaries, but they are so constituted that they form one connected idea from the beginning to the end. The reading of an isolated Sutra without any reference to what precedes or what follows may not be comprehensive, but when studied in the light of each other or in concordance *i.e.*, with Sangati, no such difficulty will arise, as their language is plain, and the terms used have an ordinary sense.

Style of the Sutras.

Jaimini has classified them thus: (1) Sutras enunciating general principles, (2) Sutras which expressly refer to particular texts of the Vedas with regard to some one or more points requiring interpretation in such texts. Hence they could only be presented in the shape of illustrations.

Their classification by Jaimini.

It is very difficult to fix any age when Jaimini, the founder of

Age of Jaimini. the Mimansa system, lived and worked. The following facts may prove to be helpful in this connection:—

(1) "The term Mimansaka occurs in Mahabhashya. It is very probable that this refers to the subject of the Purva Mimansa, as the term also occurs there in contradiction to *Auktika* (Sec. I. St. xiii, 455, 466).

(2) Though the name of Jaimini is mentioned in the Puranas as the revealer of the Sama Veda, there is no mention of his name in the Vedic literature.

(3) Though the word Jaimini is irregularly formed, it is not mentioned in Panini or the Mahabhashya.

(4) Panchatantra, the date of which is more or less ascertainable, mentions Jaimini as the author of Mimansa.

(5) The names of many teachers are mentioned in Jaimini Sutras, as for example, Badari, Badarayana, Lalukayana, Atisayana. The names of some of these are found in works such as Tritriya Pratisakkyā, the Srauta-sutra of Katyayana, Kaushitaki Brahmana, Brahma-Mimansa-Sutra.

(6) The leading commentator of Jaimini is Savara Swami, whose work again is the subject of Kumarila Bhatta's commentary. The commentary of Savara Swami is cited by Sankara in Vedanta-Sutra-Bhasthiya III, iii, 53, and Kumarila Bhatta has been identified by the scholiast of the Prabodha-Chandrodaya with Tantatita.

(7) Mimansa Sutras are mentioned by Bhartrihari, whose date of death has been ascertained to be 650 A. D.

(8) The fact is ascribed to Jaimini that he has made certain Sutras simply relating to the interpretation of certain Mlechchha words, as Pika, Tamarasa, Nema, etc.

(9) The mention of the Mimansa in the Yajnavalkya Samhita."

K L. Sarkar (p. 511.). the learned Tagore Law Professor, concludes from these facts that when Jaimini's Sutras were composed no Smriti works in any elaborate shape existed, and the Aphorisms must be deemed to date before the metrical works of Manu and the rest came into existence; they certainly precede most of the Pauranic works. There is nothing clear to enable a comparison between Jaimini's time and that of Panini. No doubt Jaimini's followers made use of the grammatical doctrines of Panini, but he did not do so; therefore, nothing can be said with certainty. Besides, the Sutras abound in peculiar grammatical doctrines different from those of Panini.

In *Beni Prasad v. Hardai Bibi* (14 All. 67) their Lordships of the Allahabad High Court held that Jaimini lived in the thirteenth century

of the Christian era and that he was subsequent in date to the Mitakshara. This view is manifestly incorrect. According to Colebrooke, Bhagawan Upavarsha was the first annotator of Jaimini's work Savara Swami followed next. Sankaracharyya, who is believed to have lived about 900 A. D. cites Savara Swami. So the Sutras must have existed before 650 A.D., as they are mentioned by Bhartrihari, the date of whose death is believed to be 650 A. D. Moreover, the life of Buddha Deva shows that he studied the six systems of philosophy including Jaimini's systems. So Jaimini must have lived before him.

The chief followers of Jaimini's Mimansa system are as follows :

1. Bhagawana Upavarsha. Bhagawana Upavarsha has been proved to be the first commentator of Jaimini's system, so Colebrooke calls him Jaimini's scholiast. He selected all the difficult, abstruse and unintelligible passages from the Vedas and placed them under the different Sutras of Jaimini, rendering the meaning and sense of his Sutras clear. This process simplified the Sutras, and he thus rendered a great service to the Vedic literature.

Savara Swami prepared an elaborate commentary on Jaimini's Sutras. His discussions may be classified under two heads :

2. Savara Swami. (1) The explanation of the general principles enunciated by Jaimini. (2) A thorough disquisition from every point of view of the texts either referred to by Jaimini or introduced by Bhagawana Upavarsha.

There are two editions of his work, one by Pandit Jivananda Vidyasagara and the other by Pandit Mahesh Chandra Nyayaratna.

3. Kumarila Bhatta Kumarila Bhatta was the first to systematise the general principles of the Mimansa Sutras with a view to solving practical questions of interpretation, such as distinctions between Vidhi, Niyama and Parisankhya.

He composed metrical couplets or Slokas containing the general principles of Jaimini's work, which are now known as Bhatta's Padas. His great work is divided into three books. The first contains a metrical exposition of the first chapter of Jaimini's Book I, dealing with the philosophical portion of his Sutras. It is named Sloka Vartika. The second gives the explanation of the Sutras, partly in verse and partly in prose, mostly on the lines of Savara from the beginning of the second chapter of Book I to the end of Book III. This book is called Tantravartika.

The third follows up the Sutras from the beginning of Jaimini's Book IV to the end of the work. It is in prose and is called Tuptika.

Colebrooke's *Miscellaneous Essays* (Vol. I, p. 323) contains the following comment on Bhatta's work :—

"Kumarila Bhatta figures greatly in the traditionary religious history of India. He was the predecessor of Sankaracharya and equally rigid in maintaining the orthodox faith against heretics, who reject the authority of the Vedas. He is considered to have been the chief antagonist of the sect of Buddha and to have instigated an exterminating persecution of that heresy. He does, indeed, take every occasion of converting the authority and doctrine of Sakya or Buddha, as well as Arhat or Jina together, with obscurer heretics Baudhayana and Masaka; and he denies them any consideration, even when they do concur upon any point with the Vedas. The age of Kumarila, anterior to Sankara and corresponding with the period (299) of the persecution of the Buddhas, goes back to an antiquity of much more than a thousand years. He is reputed to have been contemporary with Sudhanva, but the chronology of that prince's reign is not accurately determined."

Guru Prabhakara is the reputed rival of Bhatta. His work is *Prakarana Panchika*, which is a philosophical treatise and has nothing to do with the principles of construction. He differed with Bhatta, but the difference was mostly on philosophical doctrines and not on the rules of interpretation.

4. Guru Prabhakara.

Madhava Acharya's great work—the *Nyaya-Mala-Vistara*, which was printed by Theodore Goldstucker in 1865, contains an enumeration of Nyayas, their substance being reduced to Slokas or metrical forms. In each *Adhikarana* he shows some general principle as applied to a particular Vedic text which Bhatta chose to adopt, out of the various texts shown in Savara Swami's commentary. The account of his life has been given by Colebrooke thus :—

5. Madhava Acharya.

"Madhava Acharya was both priest and minister, or civil as well as spiritual adviser of Bukka Raya and Harihara, sovereigns of Vidyanagara on the Godavari (A. D. 1336), as his father Mayana had been of their father and predecessor Sangama, who ruled over the whole Peninsula of India."

Partha Sarathi is the annotator of Kumarila Bhatta's works as Kumarila Bhatta is that of Savara Swami. His commentary on Kumarila's *Sloka Vartika* is known as *Nyaya-Ratnakara*. Another work of his is *Shastra Dipika*, which purports to be an original commentary on Jaimini's *Sutras*, but in reality it is a digest of Kumarila Bhatta's views.

6. Partha Sarathi Misra.

Khandadeva, a follower of Bhatta's school, gave a clear exposition of the Sūtras in his work called *Mīmāṃsā Kaustubha*, the second chapter of which deals very nicely with *Ārthavādas*. Bhatta *Dīpikā* is also a comprehensive work of this *Mīmāṃsist*, in which he has reviewed the views of *Partha Sarathi Misra* and *Madhava-charya*. His another work, *Bhāttarahasyam*, treats in detail with the grammatical principles of construction taught by Bhatta.

Gaṅga Bhatta's illustrious work is Bhatta *Chintamani*, a section of which is *Tarkapada*, which is a very valuable treatise on the *Mīmāṃsā* literature, and explains many of the chief *Bhāttapādas*, the most important being on *Vidhi*, *Niyama* and *Parisāṅkhyā*.

Somanatha's work is *Mayukhamala*, which is a gloss on *Śāstra Dīpikā* by *Partha Sarathi Misra*.

Raghavananda's work is *Nyayavali Dīdhiti*, giving a vivid interpretation of the *Jaimini Sūtra*.

Vedāntadesika's work is known as *Mīmāṃsā Paduka*, a short work in *Sragdhara* metre. Another work of his is *Sheswara Mīmāṃsā*, in which he attempted to reconcile the *Jaimini Sūtras* with the *Vedānta Sūtras*.

Appa Dikshita's famous work is *Vidhirasayana*, which nicely deals with the classification of *Vidhis*.

Bhatta Sankara, the father of *Nīlkantha*, produced *Mīmāṃsā-Bala-Prakash*, which illustrates the *Sūtras*, classifies their contents and deals with the subject of *Badha* in a very practical way. His other work *Mīmāṃsā-Sara-Saṅgraha*, which is a synopsis of the *Sūtras* is a nice little compendium.

Narayanatīrthamuni's work Bhatta-Bhasha-Prakasa is another useful book on *Sūtras*.

Rameshwara Suri's work is *Subodhini*, which is one edition of the *Sūtras* with short notes.

His well-known work is *Adhikarana Kaumudi* containing the exposition of a number of useful *Adhikaranas* or *Nyayas*.

His famous work is the *Ārtha Saṅgraha*, and that of his father, *Bhābhāna-Saṅgraha* and *Bhābakalpa-lata*.

His valuable work is the *Mimansa Nyaya-Prakashia*. He produced a number of *Mimansa* works, such as *Mimansa-Nyaya-Prakarana-Adhikarana-Chandrika*, *Vadkautulala* and *Apadeviya*. The first one is a standard *Mimansa* book. His father *Anantadeva* was a famous *Mimansa* writer, whose work is *Deva-Swarupa-Vichara*, *Apadeva's* son, *Jivadeva*, wrote *Blatta-Bhaskara*.

The above two authors flourished in the Mahomedan period, during which time the *Mimansa* literature had extended a great deal. The *Mimansa* literature of this period does not aim so much at the exposition of the *Sutras* with a view to show their bearing on the *Smṛiti* law.

**19. Rangara -
ja-Dharindra.**

His work is *Mimansa Paribhasia*.

**20. Ram Chan-
dra Bhatta.**

He is the author of *Vidhi Vada* and *Adhika-rana-Mala*.

**21. Kishori
Lal Sarkar.**

He is the author of the *Mimansa Rules of Interpretation*, the only book on the subject in the English language.

This vast field of the *Mimansa* literature has thus been trodden by so many geniuses. That shows with what earnestness the *Mimansa* principles and rules have been developed by the Hindus. Certain families devoted themselves wholly to the study of this subject, which attained its zenith during the Mahomedan rule.

SECTION 4. CLASSIFICATION OF VEDIC TEXTS

**Classification
of Vedic texts.**

The classification of the Vedic texts or the revealed law has been given by Jaimini in good many different ways and with different aspects and purposes. One of them, which is the chief classification, is as under :

1. **विधि**—Obligatory texts called *Vidhis*.
2. **निषेध** or **प्रतिषेध**—Obligatory texts called *Nishedhas* or *Pratishedhas*.
3. **अर्थवाद**—Non-obligatory texts called *Arthavadas*, which are connected with particular *Vidhis*.
4. **नामधेय**—Non-obligatory texts called *Namadheyas*, unconnected with any particular *Vidhi* but dealing with general definitions and denominations.
5. **मन्त्र**—The *Mantras*, a peculiar class of texts only occurring in the *Vedas*.

The Sanskrit definition of duty is Chodana Lakshana Artha (what is to be done by virtue of a command). From this the definition of a *Vidhi* is *Chodana Lakshana Shabda* (an expression having the character of a command). This definition is not

**1. Vidhis.
Their defini-
tions and diffe-
rence,**

correct, as the word 'chodana' does not imply a sanction when used with the word *Shabda*, as it does when used with the word *Artha* in the definition of duty. So the Mimamsakas adopt this definition of Vidhi: "*Aprapta prapako Vidhi*." "A Vidhi is that which puts one in a position which ordinarily he is not apt to get into." A sanction is necessarily implied in this definition of Vidhi. Briefly put, Vidhi means a mandate—that which must be done; it is expressed in a very simple and unambiguous language without any superfluity.

The definition of a Nishedha is just the reverse of Vidhi. A
 2. **Nishedhas.** Nishedha is against *raga prapta*, that is, it is a "prohibition of what one is apt to do by the impulse of some particular passion." So there is *no difference* between a *Vidhi* and a *Nishedha* in principle, the one being a positive command and the other negative. Both contain a command imposing an obligation.

An Arthavada is a statement about a Vidhi without adding to or deducting any thing from it अर्थवादानां हि सिद्धक-

3. **Arthavadas.** पोऽर्थो न हि तदर्थस्य कस्यचित् प्रतीयते । It may explain the reason of a Vidhi; हेतुवन्निगदाधिकरणम् । सूर्येण जुहोति । [Jaimini I. ii. Adhi. 3] it may illustrate it विधिवन्निगदाधिकरणम् । औदुम्बरो यूषोभवति [Jaimini I. ii. Adhi. 2]; it may expatiate on its benefits; विधिनात्वेकवाकत्वात् स्तुत्यर्थेन विधीनां स्युः [Jaimini I. ii. 7] or it may present its effect in a tempting form to those who may not be able to apprehend its spiritual value. So it is an explanatory or illustrative text or a text in the nature of a recital or a preamble. Jaimini has also laid down the principle that an explanation or illustration can never be allowed to control the words of an obligatory rule, which is just in consonance with the modern principle of interpretation. This principle has been very nicely explained by Jaimini, when he says that if you take an Arthavada as adding to a Vidhi, then it becomes a separate additional Vidhi itself. विधी च वाक्यभेदः स्यात् । [Jaimini I. ii. 25]. If it be taken as deducting anything from a Vidhi, it becomes a separate conflicting Pratishedha Vidhi (negative command). Jaimini would never allow this, so long as the text was capable of being construed as an Arthavada. Arthavada is not allowed to interfere with a Vidhi, but it facilitates its comprehension and application and is thus its concomitant तुल्यं च सम्प्रदायिकम् [Jaimini I. ii. 8].

Some illustrations and explanations from writers on Vyavahara law will explain this principle of Arthavada better: Medhatithi in his commentary on Sloka 3, Chapter II of Manu, explains that the word *Vidhana* (provisions of law) used in that Sloka, does not include-

Arthavada, which merely confirms what has already been established and does not contain any direction for doing it. **अर्थवादानाम् हि सिद्धरूपोऽर्थो न हि तदर्थस्य कर्त्तव्यता प्रतीयते ।** Kulluka Bhatta also in his commentary on Sloka 6, Chapter II of Manu explains that an Arthavada tends to establish duties by containing praises, which are to be read as a part of a Vidhi proposition. **अर्थवादानामपि विभ्यैकवाक्यतया स्तावकत्वेन धर्मे प्रामाण्यात् ।** Jimutavahana supports the right to inheritance by reason of the fact that the inheritor or heir offers funeral oblations to the deceased : "The succession of grandfather's and great grandfather's lineal descendants including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering : since the reason stated in the text 'for even the son of a daughter delivers him in the next world, like the son of a son,' is equally applicable, and his father's or grandfather's daughter's son, like his own daughter's son, transports his mane over the abyss, by offering oblations of which he may partake." In the above text the first part of the passage is the Vidhi regarding the succession of the persons in question, the remaining part is an argument in support of the Vidhi. This is only an Arthavada. So even if a lineal descendant of the paternal grandfather has not performed the funeral oblations, he is not precluded from the inheritance. This is the practical application of the Arthavada maxim.

Kulluka and Medhatithi, the two great commentators of Manu, observe with regard to the definition of Dharma or Vidhi as given by Jaimini that anything expressed in the imperative mood in the sacred books is not Dharma or Vidhi, but it must be a matter which is commanded and which at the same time is productive of spiritual bliss. So text *Shyenena abhicharan yajeta* is not a Vidhi or Dharma text but is merely an Arthavada (a). They explain Arthavada as being the statement of what is already established and thus show that it does not impose any duty by itself (b). Medhatithi holds that an Arthavada, which is not connected with a Vidhi text but gets its support from some other department of knowledge may be regarded as a Gunavada (general clause) (c) **अर्थवादे तु प्रमाणान्तरानुसारेण गुणवादो न दोषाय इति ।**

Namadheyas are descriptions of names and correspond with modern 'definitions and general clauses' originating in the 'Apurva sanction, but do not contain a

(a) Kulluka's commentary on Sloka 1, Ch. II and also
'Medhatithi's commentary on Sloka I. Ch. II.

(b) Medhatithi's commentary on Sloka 3, Ch I, and

Kulluka's commentary on Sloka 6, Ch. II.

(c) Medhatithi's commentary on Sloka 103, Ch. I.

command in themselves अपि वा नामधेयं स्योद्यदुत्पत्तावपूर्वमविधा यकत्वात् [Jaimini I. iv. 2].

The difference between Arthavadas and Namadheyas is that the one has reference to a particular Vidhi while the other has none. As a definition, it has some bearing on the general scope of the subject यस्मिन् गुणोपदेशः प्रधानतोऽभिलम्ब्य [Jaimini I. iv. 3] This distinction is not foreign to the modern law of interpretation. Medhatithi has somewhat extended the meaning of the word Namadheya अर्थवादे तु प्रमाणान्तरानुसारेण गुणवादो न दोषाय इति । Jaimini has clearly laid down [I. iv. 4] that a text may be in the form of a Vidhi, but in substance it may be a Namadheya. Some Mimansakas limit the term Namadheyas to the proper names of some ceremonial acts. The language of Sutras is comprehensive enough to include all cases of nomenclature and definition. Sometimes the ordinary meaning of a word or a set of words has to be ignored when they are used merely as proper names.

वैश्वदेवादिशब्दानां नामधेयताधिकरणम् । [Jaimini I. iv. 10].

Considering this difference in the light of the definition of Vidhi, that which makes *prapta* प्राप्ता of an *aprapta* अप्राप्ता i.e., which compels one to do what he would not spontaneously do, is the inflexible will of the law-maker. It is not an expression of the will in the case of an Arthavada. It is an observation in the nature of a commentary, as if the law-maker condescended to point out the merit of the law from the ordinary point of view. Or in other words, an Arthavada is in the nature of a gloss made by the law-maker himself. When a matter has an *angangi* अङ्गाङ्गी relation with a Vidhi or when it is a part and parcel of a Vidhi, it is either an applicatory Vidhi or a *prakarana* प्रकरण, if it is of an authoritative character, but not so if it is only an Arthavada. An Arthavada is not *aprapta prapaka* but only a *prapta prapaka* in the sense that it relates to what has been already concluded by a declared Vidhi.

K. L. Sarkar (p. 41), the learned Tagore Law Professor, has explained *Namadheya* thus : "A Namadheya is an independent clause. It is not in the nature of a gloss on a particular Vidhi. It is a statement made by the law-maker in his character as such, and is in this sense authoritative ; but it simply states what is what. Such a statement does not directly bear upon any particular Vidhi. By defining things it serves to elucidate the main purpose of the Vedic Law. It serves to show what things would come under the category of Swargakama and what not. For instance, the Namadheya, *Shyenena Yajeta*, explains that *Shyena Yaga* is a *Yaga* for doing mischief to others, and therefore, that Yaga cannot be the subject of an Utpatti Vidhi or of any Vidhi. Thus, Namadheya elucidates the *Pradhana Chodana* tending to show

what things are unfit to be embraced in it, and what are to be so embraced."

5. Mantras.

The Mantras are a peculiar class of text, which occur in the Vedas and have nothing to do with law.

Another classification due to obligatory force.

Jaimini sub-divides the Vidhi texts from various points of view. According to the degree of obligatory force they are classified as follows:—

(1) *Vidhi proper*, (2) *Niyama* and (3) *Parisankhya*.

This classification contemplates only positive injunctions and not prohibitions. As the sanction of a positive injunction is chiefly the unattainable character of benefit to be gained by complying with it, the degree of the obligatory force of such a Vidhi varies according as the benefit to be derived is wholly unattainable by other means or is partly so unattainable. Therefore, the Vidhi is perfect and absolute when the promised benefit is fully attainable by complying with it and unattainable by other means. The Vidhi becomes imperfect and not absolute when it is partly attainable by compliance with it and partly by other means. The Vidhi would be a mere recital, *i.e.*, the statement of benefit with real obligatory force, when the benefit is attainable by ordinary means also besides its being obtainable by following the Vidhi. Kumarila Bhatta differentiates between them as follows:—

"A *Vidhi* tends to secure what is otherwise at all not attainable."

"A *Niyama* tends to secure what is partially otherwise attainable."

"A *Parisankhya* consists in a statement or recital as to a benefit which is commonly attainable in its entirety either by acting according to the statement or by other means."

K. L. Sarkar (p. 42) has expressed the same view in present-day legal phraseology thus:—

1. A Vidhi is a perfect (*imperative*) command.
2. A Niyama is an imperfect (*directory*) rule.
3. A Parisankhya is a *monitory* precept.

A Vidhi supplies an urgent necessity, a Niyama is not so urgent; while a Parisankhya is hardly required as a rule of law. These illustrations would clear this point; **द्वादश्यां पारयेत्** "Take a goodly meal after the fasting on the eleventh day of the moon". It is a Niyama, which implies that the meal is to be taken unless one has any good reason for abstaining from it.

पञ्च पञ्चनखाः भक्ष्याः । "The flesh of animals whose feet are divided into five nails is eatable." This means that you *may* eat the flesh only of such animals but not that you *shall* eat it. This is a Parisankhya.

Some jurists hold that a Parisankhya is meant to prohibit all that is not permitted by it, and it should be taken as an implied prohibitory Vidhi. But this view has been refuted by Savara and Kumarila Bhatta and Jaimini himself [I. ii. 42 and 43], who puts Parisankhya as Arthavada परिसंख्या अर्थवादो वा ।.

There appears to have been an effort on the part of recent Smṛiti writers to make out that a Parisankhya was an implied prohibition. But this view has not been countenanced by the leading Mimamsakas. Jīmūtavahana only alludes to but does not expressly mention Parisankhya in his discussion on the interpretation of the text regarding partition by the sons after the death of their parents. He begins his arguments by saying that the text cannot be taken by way of Parisankhya as implying a prohibition of partition during the life-time of the parents by the express mention of partition at their death. He alleges that to take it as making such an implication would be open to the objection of giving the go-bye to what is expressly mentioned. This is one of the objections which the leading Mimamsakas urge against the view of accepting Parisankhya as an implied prohibition. The difference between a Niyama and a Parisankhya and between a Vidhi and a Niyama has been given by Medhatithi in his comments on verse 45, Ch. III, Manu : यः शब्दः कर्त्तव्यताबोधकः अग्निहोत्रं जुहुयात् स्वर्गकाम इति । न ह्यग्निहोत्रस्त्वैतद्वचनमन्तरेणान्यतः कुतश्चित् कर्त्तव्यतावगमः ।

'Vidhi is an expression which declares a duty, as for instance, the expression 'offer fire sacrifice for heavenly bliss,' the duty of offering fire sacrifices not being derivable from any other than the text mentioned.'

नियमः पुनर्यत्रादृष्टसिद्ध्यर्थस्य वचनमन्तरेण पाक्षिकी प्राप्तिः । यथा समे यजेतेति दर्शपौर्णमासादि यागविधानाद्देशभाव मापतितम् ।

"Niyama takes place when an expression connected with a duty regarding a spiritual (unseen) matter is applied to something involved in that matter, as for instance, regarding the Darsha Purnamashi Yajna, there is the direction to perform it on an even ground, implying a suggestion of not choosing an uneven ground, which, if chosen, would contravene the collateral direction."

It may be remarked that the contravention of the direction will not invalidate the Yajna itself, but would reduce its Apurva transcendental benefit.

अथ पञ्च पञ्चनखा भक्ष्या इति जुत्प्रतिघाते नार्थेन शशकादिष्वपि भक्ष्यता प्रसक्ता तद्व्यतिरिक्तेष्वपि वानरादिषु । न च तत्र पर्यायेणैव प्रवृत्तिः । युगपत् तत्र चान्यत्र च प्रसक्तौ पञ्च पञ्चनखा भक्ष्या इति वचनमितरपरिसंख्यानार्थं परिसम्पद्यते ।

As regards Parisankhya Medhatithi explains that the expression 'Five of the class of five-nailed animals may be eaten,' also suggests the eatability of the others of that class. And as regards this eatability, the natural inclination of eating (which varies) will not (uniformly) recognise the fitness of some to be preferred to others. Hence this text is meant to suggest rather the unfitness of all but the five mentioned for food, than the fitness of those mentioned."

He then mentions the three objections against the view of accepting Parisankhya as an implied prohibition. But he concludes by saying that in the particular case which he was considering Parisankhya as suggesting the undesirability or ineligibility of the non-mentioned things compared with those mentioned, was applicable.

Raghunandana also explains these three terms in his Prayaschitta Tattwa (J. N. Vidyasagara's Ed. p. 485) thus:

चांद्रायणादौ भोजनस्य रागप्राप्तत्वात् नाप्राप्तप्राग्विधिः

"The direction about eating in the Chandrayana Vrata cannot be Vidhi, because a direction to do what every man is eager to do by natural impulse is not a Vidhi."

अहरहः संध्यामुपासीत इत्येवं रूपम् ।

"A Vidhi is like the command 'perform the Sandhya prayer at all times.'"

"The direction about eating in the Chandrayana Vrata is also not a Niyama Vidhi, as it can have effect only in the contingency of one not using his own discretion to refrain from eating from a sense of its not being needed."

"It might be a Niyama Vidhi if the direction was 'Eat at such and such day of the noon in such and such month.'"

**नापि तद्भक्षणस्यानावश्यकत्वेन स्वाधौ गम्यवच्छेदमात्रफलका नियमविधिः
स च तन्नित्यौ तत्तदप्राप्तान् भुञ्जीतैवेत्येवं रूपः**

"A Niyama takes place when, although a matter is optional, it should be done in a certain case."

When it is said that a man should satisfy his hunger or appease his thirst, there is no law, because no law is required for such purposes. These statements do not show any want which could be called *Aprapta* (not apt to be spontaneously fulfilled). The whole is *Prapta*, i.e., apt to be spontaneously fulfilled. But when it is said that a man should not marry within certain degrees of relationship, this is law, but a law of worldly nature or a civil law, for a rule is required to ensure what otherwise would be *Aprapta* (not apt to be spontaneously fulfilled).

The spiritual or the ecclesiastical law as well as the Vyavahara

Like classification of spiritual Vidhis. law classifies Vidhis into Vidhi, Niyama and Parisankhya. The difference between a spiritual

Vidhi and a Vyavahara Vidhi is the same as between Niyama and Parisankhya. The difference in the two laws is that in one case the sanction is the hope of obtaining what is absolutely unattainable by other means and the fear of losing it in case of non-compliance, while in the other, the Vyavahara law, the sanction is the hope of obtaining what the society through its representative, the king, can and does secure to a man and also the fear of punishment at the hands of that representative of society. In the same way, a spiritual (Vedic) Niyama relates partly to things absolutely unattainable by worldly means and partly to those that are so attainable by those means. A Vyavaharic Niyama is partly of the character of a rule having the sanction of punishment by the society and partly a matter of discretion.

Vyavaharic Niyama illustrated. "The prohibition of marriage within certain degrees of family relationship is a Vidhi, the non-observance whereof would vitiate a marriage. But the direction of Manu that the bride must be an amiable and healthy girl is a Niyama, the non-observance of which would not vitiate a marriage." Vijnaneshwara says that "in transgressing the prohibition against (espousing) sickly and the like brides, there is only a transgression of a visible rule (framed with a popular object), the status of a lawful wife is super-induced notwithstanding [the existence of those defects.]"

Jimutavahana contends that the expression 'the sons may partition the property after the death of the father and mother' is not a Vidhi, because such a partition is not *Aprapta Prapaka*, i.e., by such partitioning they would get nothing which might not be got in the usual course of things by virtue of their proprietary right. He says that it cannot be a Niyama in the Vedic or in the Vyavaharic sense of the term, that is, as laying down a direction as to the time of partition. He further asserts that the text is an *Anuvada*, that is, a mere explanatory text.

Parisankhya. Parisankhya is a direction in respect of a thing which is wholly a matter of discretion and not partly so, but at the same time it is sometime authoritatively laid down.

So it is both *prapta* and *aprapta*.

Raghunandana discusses the character of Parisankhya in his learned treatise, *Prayaschittatattva* (p. 485) and says that, in general, it is wrong to act upon the principles of *expressio uniterius est exclusio alterius*, but in exceptional cases the principle may be adopted as in the

case quoted below which he was considering :

तस्मादगत्या “श्रुतार्थस्य परित्यागादश्रुतार्थस्य कल्पनात् ।

प्राप्तस्य वधादित्येवं परिसंख्या त्रिदोषिका ॥

अन्यार्थश्रूयमाणा च यान्यार्थप्रतिषेधिका ।

परिसंख्यातुसा ज्ञेया यथा प्रोक्षित भोजनम् ॥

K. L. Saikar enunciates it thus, “ In fact, as in the case of revealed law and the laws of the Acharakanda so in the Vyavahara Jurisprudence, a Vidhi is an imperative command, a Niyama is more or less a directory or regulatory rule, and a Parisankhya is, in general, a monitory or recommendatory rule, but in exceptional cases, implying a suggestion of prohibiting the correlative of what is recommended.”

“ Both Jimutavaliانا and Vijuaneshwara quote another case where a rule is to be taken as directory or monitory in the Vyavahara law. This is where a Vidhi of the nature of a merely spiritual or moral character occurs in the body of the Vyavahara law but is inconsistent with some positive provisions of its own. Such a rule would undoubtedly be a Vidhi in the spiritual or ecclesiastical jurisprudence, but occurring in the body of the Vyavaharic law and contradicting any of its established rules it must be taken merely as recommendatory or monitory. Where, however, such a moral or spiritual rule does not contradict any established rule of the Vyavahara law but, on the contrary, is in unison with it would support and strengthen the particular Vyavahara rule corresponding to it.”

This distinction between the three classes of Vidhis and the question whether the operative word of a text is to be construed as *shall* or *may* is not peculiar to the ancient Hindu Law but is found in the modern system of jurisprudence as well,

The gradation of obligatory force with reference to the consideration of the sanction of benefit is not a fanciful thing as in the case of modern law, which makes legal rules rest on the sanction of loss of benefit. For example, the law of limitation has for its sanction the loss of a right which a man possesses ; the law of compulsory registration is based upon the sanction of loss of benefit of the document, if it is not registered. In these cases there is no sanction of positive punishment. In the case of the Stamp law the sanction is partial and not so complete as in the above two cases. If a man fails to pay the requisite stamp duty except in some cases, he does not absolutely lose the benefit of the document, but on paying a certain amount by way of penalty, he may get the benefit of it. So to measure the obligatory force of a Vidhi by the degree of loss of benefit accruing from its non-compliance is not open to objection and is not peculiar

to the Hindu system of law.

The Vidhis have also been classified according to *their nature and purpose*. A distinction between adjective and substantive law has been made in modern law books. The adjective law is further sub-divided into rules which essentially affect the obligations imposed by the substantive law and mere rules of procedure. There is another class of rules regarding personal qualifications and competency, e.g., who is competent to contract. The Vidhi texts have been classified as follows :—

Classification of Vidhis according to their nature and purpose.

- (1) *Utpatti Vidhis*—Substantive obligatory rules
- (2) *Viniyoga Vidhis*—applicatory rules.
- (3) *Prayoga Vidhis*—rules of procedure.
- (4) *Adhakara Vidhis*—rules laying down personal qualifications and personal competency.

Utpatti means 'originating'. The *Utpatti Vidhis* are the basis of obtaining the main object of the Vedas, viz., salvation or heavenly bliss, and the acquisition of a civil right stands in the same position in the domain of civil law. So Vidhis that originate a right correspond to the Vedic Utpatti Vidhis. The Vidhis which enforce the performance of the *Agnihotra Yaga* स्वर्गकामो अग्निहोत्रं जुहुयात् and *Darsa Purnamasi Yaga* स्वर्गकामो दर्शपौर्णमासाभ्यां यजेत are Utpatti Vidhis and are the substantive Vedic laws of the highest order; other Utpatti Vidhis of less importance are नानृतम् वदेत् 'Never tell an untruth, नहिंश्येत् 'Never hurt anyone.' In all Utpatti Vidhis there is a common element, viz., *Swargakamo Yajeta*, i.e., perform ceremonies for heavenly bliss. This common element is the primary command (*Pradhana chodana*). "It is independent of material objects, and has nothing to do with the fire sacrifice or the full moon sacrifice. It is defined to be 'the command with which material things are not mixed up.' It has nothing to do with ceremonial worship, expression which is its tangible expression and is called 'Shesha'

The obligation imposed by the primary command is the duty of prayer and sacrifice. But this ideal act of duty does not stop there. It demonstrates itself by some overt act. This overt act is Karma (sacrificial ceremony) कर्माण्यपि जैमिनिः फलार्थत्वात् [Jaimini III. i. 4]. It is also accompanied by verbal acts in the shape of chanting hymns along with sacrificial ceremony तच्चोदकेषुमन्त्रादया [Jaimini II. i. 32]. Thus the command to pray and offer sacrifice for the highest state of man is to be realised mentally, to be imposed by songs and hymns, and to be made tangible by external physical acts. Realisation by

reciting verses is the chief feature of the Rig Veda **तेषामुग्यत्रार्थवशेन पदव्यवस्था** [II. i. 35]; that by songs and hymns is the chief feature of the *Sama Veda* **गीतिषु सामख्या** [II. i. 36]. That by other means besides the above is the chief feature of the Yajur Veda **शेषे यजुः शब्द** [II. i. 37] (p. 47)."

The discussion of *Svargakamo Yajeta* is essential for two reasons. Firstly, because it is difficult to follow the Jaimini Sutras without first understanding *Svargakamo Yajeta*. Secondly, because the fact that the Hindu Law is based on considerations of spiritual benefit will not be clearly understood without its aid. According to the Mimamsa Jurisprudence, the prime command, 'pray and sacrifice for the highest spiritual state' is the fountain head of all rules of the Hindu Law. Spiritual benefit is to be sought not because it is a benefit but because it is a command. No doubt the Smṛiti Vidhis are not preceded by the formula *Svargakamo Yajeta*, but to make them valid this formula must be read into them and they must be capable of having the essence of Vedic Vidhis **सामान्यधृतिवत्पनाधिकरणम्** [Jaimini I. iii. 8]. This is the underlying theory.

Guna Vidhi (adjective law) includes both Viniyoga Vidhis (applicatory rules) and Prayoga Vidhis (rules of procedure). Viniyoga Vidhis are of prime importance, as they are part and parcel of the Utpatti Vidhi (rules of substantive law). Prayoga Vidhis are of an incidental character, as they are mere rules of procedure. The former provide the means with which an Utpatti Vidhi is to be given effect to, while the latter point out the method in which it is to be carried out.

"As the *Karma* (ceremonial act) of an Utpatti Vidhi is the *Shesha* (accessory) to the prime command *Svargakamo Yajeta*, so the processes of Viniyoga Vidhis and Prayoga Vidhis, being ways and means to the *Karma* of the Utpatti Vidhis, may be regarded as the *Shesha* of that *Karma*. [Madhavacharya's Jaiminiya Nyayamala Vistara Bk. III Ch. I Adhi. 3.] These two subdivisions as well as the Adhikara Vidhis are mostly found in the Brahmanas as distinguished from the Samhitas of the Vedas. So the term *Shesha* is also applied to the Brahmanas. In fact just as an Utpatti Vidhi text (*i.e.* text regarding ceremonial worship) is a *Shesha* (accessory) to the Pradhana Chodana (text regarding ideal worship), so a Viniyoga Vidhi or a Prayoga Vidhi is a *Shesha* (accessory) to the Utpatti Vidhi. The word *Shesha* means that which is subordinate or accessory. Therefore, it is used for applicatory Vidhis, and is also applied to the Brahmana section of the Vedas in which applicatory Vidhis and Prayoga Vidhis are mostly found. Here

is an example of a Viniyoga Vidhi. 'By curdled milk perform the *Agnihotra*.' This simply indicates the way in which the *Agnihotra* is to be performed, the performance itself being commanded by the Utpatti Vidhi already referred to. Rules regarding the order (Niyama) in which the different parts of a ceremony should be performed are examples of the Prayoga Vidhi. These rules are of the same nature as modern rules of procedure. Thus it is proved that Viniyoga and Prayoga Vidhis are accessories to Utpatti Vidhis, which again are accessories to Pradhana Chodana.

The Utpatti Vidhis, besides being few, are short and simple and hence require no rules of interpretation. They are mostly used for application purposes. Jaimini deals with these rules of interpretation regarding Viniyoga Vidhis in his third book along with the subject of *Shesha*. Langakshi Bhaskara and Apadeva also describe the six principles of interpretation in connection with the Viniyoga Vidhis as follows: (1) Sruti (the literal principle), (2) Linga (the principle of context), (3) Vakya (the principle of syntactical arrangement), (4) Prakarana (the principle of part and whole), (5) Krama (the principle of succession) and (6) Samakhyā (the principle of etymological implication).

Adhikara Vidhis—rules regarding personal competency, include not only rules as to who are competent to avail of the Vedic law, but also rules as to how the shortcomings and failures of those who are so competent are to be remedied. Women have been considered competent to join the performance of Vedic duties, and Sudras are not absolutely debarred from it, though they are not generally considered competent to perform *Agneya* sacrifices. These Vidhis are similar to the rules of modern law regarding the competency of persons to enter into a contract or to do things of a like nature.

The Vedic substantive Vidhis as distinguished from Niyama or the applicatory and other adjective Vidhis, have for their object the spiritual benefit, *i.e.*, the heavenly bliss, and do not aim at visible objects or worldly benefits. If their range had stopped at that, the positive civil law of the Hindu Nation would be wholly outside the scope of the Vedas. The positive law of the Smritis dealing with visible objects and regulating the natural inclinations of men is presumed to be a part of the Vedic law. This presumption may appear rather proper as being beyond the scope of the Vedas, but in fact it is not so. The Utpatti Vidhis dealing with the invisible are not the only substantive Vidhis of the Vedas, as there is yet another class of Vidhis called *Naimittika*

(occasional) or *Kamya* (ordinarily desirable) occurring in the Vedas and recognised by Jaimini. These latter Vidhis deal with visible and ordinarily desirable worldly matters. Jaimini harmonises them with the command to seek heavenly bliss, *i.e.*, with the primary Utpatti Vidhi, either as being the means to it, or as being conjoined with it **कामी वा तत् सयागेनचोद्यते ।** [Jaimini IV. III, 22]. There is a mention of some worldly benefit in the Naimittika or Kamya Vidhis, but according to Jaimini it is so stated merely as a result and not as the aim; the subordinate character of visible and worldly matters has been pointed out in the following Sutras [IV. iii. 1 and IV. iii. 4.]

द्रव्यसंस्कार कर्मसु परार्थत्वात् फलश्रुतिरर्थवादः स्यात् ।

“Because materials, the operations performed upon them, and subordinate acts are subservient to something else, the description of a benefit in connection with any of them is an Arthavada.”

मैसितिके रिकारत्वात् क्रतुप्रधानमन्यत् स्यात् ।

“What is laid down as occasional is not principal, being derivative; the principal in the shape of religious obligation is different.” ‘The commentators of the Sutras in connection with Sutras 10 to 16, Ch. III. Book IV. take the case of a Yaga, as Viswajit, in which there is no mention about the object of the sacrifice. They say that the object is to be presumed as being Swarga or heavenly bliss. Thus there are Vedic Vidhis like the Smṛiti Vidhis dealing with visible objects and matters of ordinary inclination, though theoretically joined with the transcendental sanction.’

**Purushartha and
Kratwartha Vi-
dhis.**

Another division of the Vidhis has also been made by the Mimamsa Sutras from quite a different point of view as under :—

(1) the Vedic law relating to individual culture, which is of the nature of religious precepts, termed *Purushartha Vidhis*,

(2) the Vedic law relating to the duties of a man as a member of the Vedic community, such duties being of positively obligatory character, termed *Kratwartha Vidhis*.

This classification is with regard to two kinds of Vidhis—one as a positive command of law and the other as a mere moral precept. It is to be seen whether the latter is a positive law in the conception of the modern English jurists. According to Austin that only is a perfect positive law, the sanction of which is enforceable by a determinate body of persons having authority to enforce it. There is no determinate body for their enforcement in the case of the Purushartha Vidhis or the Utpatti Vidhis, such as *Agnihotram Juhuyat*. But in the

case of *Kratu Vidhis*, which regulate the details of a Vedic sacrifice there is the assembly of priests at the sacrifice to enforce the procedure. Thus, the *Kratwartha Vidhis* approach a degree nearer to our positive civil law than the *Purushartha Vidhis*. Hence the distinction has been made between the two classes of *Vidhis* by our *Mimansakas*.

They also indicate the difference between an *Arthakarma* and a *Pratipattikarma*. An *Arthakarma* is a duty imposed by a *Kratwartha Vidhi*, while a *Pratipattikarma* is a duty imposed only incidentally with reference to an *Arthakarma* already done. The distinction between a *Purushartha Vidhi* and a *Kratwartha Vidhi* and that between an *Arthakarma* and a *Pratipattikarma* are really distinctions between matters which are fully obligatory and those which are of a quasi-obligatory character. The former distinction has been dealt with in the first eight *Adhikaranas* of Ch. III. Bk. IV, specially in the 8th *Adhikarana*.

सुवर्णधारणादीनां पुरुष धर्मताधिकरणम् ।

The latter distinction has been explained in Ch. IV Bk. II, specially by *Sutras* 10 to 22. In these *Sutras* the author explains what is a *Pratipattikarma* (an incidental matter) as contra-distinguished from what is essentially connected with the sacrificial ceremony. Thus *Jaimini*, the father of Hindu Jurisprudence, clearly makes the distinction, between a positive rule of law and a rule of conscience. His positive law is mainly religious, while according to modern jurists nothing of the religious law can be regarded as positive, and there is a sharp line of demarcation between the positive law and religious injunctions.

Purushartha and *Kratwartha Vidhis* are further divided as follows :—

(1) those which are not connected with worldly desires, termed *Nitya* ; and (2) those which are connected with worldly desires termed *Naimittika* or *Kanya*, which are more or less tangibly connected with worldly desires and duties, the most tangibly connected being the *Vidhi* regarding the **three debts** which form the base or the groundwork of the *Smritis*. All these facts considered coherently and connectedly show that our positive law as given in the *Vyavahara Kanda* of the *Smritis* has been evolved from the Vedic law. From

**Evolution of
Smriti law from
the Vedic law:
theory of three
debts.**

Purushartha Vidhis or purely spiritual laws, which are wanting in positive features, we come down to the *Kratwartha* laws which have the essential features of positive civil law. Then from *Kratwartha Vidhis* which are mainly directed to invisible objects, we come to those *Kratu Vidhis* termed *Kanya*, such as, *Pitri Yagas*

or Pitri Sraddhas and Putreshtthi Yagas, which approach a degree nearer to our positive laws of family status and family property. Then, lastly, we come to the 'three debts' command which forms the ground work of the Smṛiti-law of status and property.

"Nitya Vidhis are those which are absolutely binding on all persons, and not dependent on any act or choice; whereas a Kamya Vidhi is that which comes into force only in the event of the man having chosen to do some act voluntarily. The distinction may be illustrated in modern language thus. A man is enjoined not to rob another of his property. This is absolute. But where a man, who has by some contract become the lessee or mortgagee of another person, is placed under certain obligations by virtue of his voluntary agreement, this would correspond to Kamya Vidhi. So, in the Mīmāṃsa Sūtra, we have Nitya Vidhis in the shape of commands that every Brāhmin should perform such and such sacrifices as a Brāhmin. This is Nitya Vidhi. But when certain sacrifices are laid down as fit to be observed by a person who chooses to do so, with the condition that if he commences it and wants to have the benefit of it, he must follow certain rules for the violation of which penalties are provided. This is a case of Kamya Vidhi." [K. L. Sarkar pp. 403-04].

Another classification of Vidhis is as under: The *Chodana* (command) is usually understood to be an injunction to do some particular act. When a *Chodana* fixes a rule without reference to any specific act, it is termed Anarabhyadhita Vidhi. Dr. Thibaut in his translation of the Artha-Sangraha explains it to be "a rule which stands by itself, out of connection with some particular sacrifice to which it might be referred, so that it must be considered as a general rule." In the Smṛiti law there are many Vidhis of this nature.

Another very important classification of Negative Vidhis or prohibitions is as follows:

(1) A *Pratishedha* or Nishedha, which is a general and absolute prohibition. (2) A *Paryudasa*, which is a qualified or exceptional prohibition प्रदेशानाराभ्यविधानयोर्निषेधस्य पार्युदासत्वम् [Jaimini X. viii, 1.].

A conflict would arise when against a positive text there is a *Pratishedha* text. In this case both the texts lose their force as Vidhis and become texts, which may be accepted or rejected at option नातिरात्रे षोडशिनमिति निषेधस्य विकल्पकत्वम् [Jaimini X. viii, 3]. This is called *Vikalpa* or a matter of option. No such conflict should be assumed as long as the texts may be reconciled by some reasonable means. This difficulty will,

however, not arise in the case of a positive Vidhi and a Paryudasa attached to it, as they are not inconsistent with each other, as a *Paryudasa* is in fact an *exceptional clause or a proviso*.

प्रदेशानारभ्यविधानयोर्निषेधस्य पर्युदासत्वम् । [Jaimiti X. viii. 1]

Partishedha or Nishedha is a general and absolute prohibition, while Paryudasa is a qualified or exceptional prohibition. Their difference will be clear from the provisions of exclusion from inheritance of persons for certain disabilities, although they would otherwise be heirs. These rules of exclusion are of the nature of Paryudasa and not Pratishedha, as is clear from the texts of the Dayabhaga and the Mitakshara. The latter puts the subject thus:

“The author states an exception to what has been said by him respecting the succession of the son, the widow and other heirs, as well as the re-united parcener. An impotent person, an outcast and his issue, one lame, a blind man and a person afflicted with an incurable disease, as well as others (similarly disqualified) must be maintained; excluding them, however, from participation.”

पुत्रपत्न्यादि संसृष्टीनाम् यदाय ग्रहणमुक्तं तस्यापवादमाह ।

क्रीबोऽथ पतितस्तज्जः पङ्क रन्मत्तको जङ्गः ।

अन्धोऽचिकित्स्यरोगाद्या, भर्त्तव्याः स्युर्निरंशकाः ॥ [Ya]. II. 140]

Still another division of Vidhi and Pratishedha is between (1) *Pratyaksha* (express) and (2) *Kalpya* (implied). This division has reference to the materials which evidence the Vidhi or the Pratishedha. A *Pratyakshya* Vidhi is embodied in an express text, while a *Kalpya* Vidhi is made out constructively by such means as *Linga*, *Vakya* and *Prakarana*. Similar is the case with the two kinds of Pratishedha.

Shabdibhavana and *Arthibhavana* mean realising the primary command *Swargakamo Yajeta* doubly; firstly, by directing attention to the force of the command, and secondly, to the assurance of benefit to be derived from fulfilling it. It is very essential according to the modern theory of legislation to know the object or reason of a statute for the purpose of interpretation of passages, the meaning of which cannot be satisfactorily determined either by the principle of literal construction or by the principle of construction by context. In such cases the modern jurist would enquire, what was the evil which the statute was passed to remedy or what good it intended to secure? After determining this they use it as a test in ascertaining the meaning of an obscure

or apparently unreasonable passage. It has already been said that *Svargakamo Yajeta* is the keynote of the whole of the Vedic law. So in modern sense it may be said to be the object and reason of the Divine Eternal Legislation, the object of which is to ascertain duty (Dharma) spiritually, and the meaning of this fundamental command at every step must be realised from the *double* point of view, as an imperative command and as an assurance of supreme spiritual benefit, laying stress in the one case on the verb *Yajeta* (pray and sacrifice) and in the other case on the noun *Svargakamo* (the seeking of heavenly bliss). When this is done, it can be ascertained whether a text is or is not a proper Vidhi text, by seeing if it stands that test of the double *Bhavana* as stated above. For example, the text "By *Syena* ceremony practise mischief to enemy" is not a Vidhi but a mere description (*Namadheya*), because it does not stand the test of the *Arthabhavana*. The method of treatment by Jaimini and modern civil jurists is similar.

An *Adhikarana* is a Mimamsic process of establishing principles of construction. Kumarila mentions five steps for its establishment in the following Sutra:

"The text under consideration, the doubt concerning it, the first side, the other side or answer and the conclusion, all these constitute an *Adhikarana* (a complete theme)."

विषयो विषयश्चैव पूर्वपक्षस्तथोत्तरम् ।

निर्णयश्चेति पञ्चाङ्गं शास्त्रे ऽधिकरणं स्मृतम् ॥

Colebrooke (in his *Miscellaneous Essays* p. 326) explains an *Adhikarana* thus:

A complete *Adhikarana* or case, consists of five members, *viz*:

- I. The subject or matter to be *explained*.
- II. The *doubt* or question arising out of that matter,
- III. The first side or *prima facie* argument concerning it.
- IV. The answer or demonstrated conclusion (*Siddhanta*).
- V. The pertinence or *relevancy*.

K. L. Sarkar in his learned treatise on *Mimamsa Rules of Interpretation* (p. 62) very aptly remarks:

"This process of interpretation is unobjectionable. It gives a prominent place to the view opposed to what is eventually adopted by way of conclusion, which by this method acquires a greater clearness and strength than otherwise would have been the case. This mode of argumentation, consisting of *Purvapaksha* or *prima facie* argument, the *Uttara* or the refutation of it, and then the *Siddhanta* or conclusion, is peculiar to the Hindu literature. It pervades all Sanskrit discursive

works, The system of Adhikarana has been followed in Uttara Mimamsa or Vedanta. An Adhikarana is also called a Nyaya."

In the words of Colebrooke, the logic of Mimamsa is the logic of law. No wonder, therefore, that the same word Nyaya is applied to a legal thesis, and to a thesis of formal logic. In both cases an Adhikarana consists of five parts. According to Gautama a syllogism also consists of five members. There is, however, one great difference that in logic the conclusion is arrived at, firstly by affirming a general proposition of fact, and then showing that the particular proposition in question is covered by that general proposition. "But in a Mimamsa Nyaya the basis of solution is either the authority of the Sruti or of principles enunciated in the Smriti, which are not inconsistent with the Sruti or the authority of *Shishtachara* (i.e. usages prevailing among good men). It would be seen that arguments resorted to in courts of law are based on similar grounds. And as in a court of justice when the Judge comes to a decision on a point of law from premises partaking of the nature of law, custom, etc., his decision becomes a settled principle of interpretation, when a similar question arises; so the Siddhanta arrived at by Jaimini in each Adhikarana of his book upon the particular question raised in that Adhikarana, furnishes the method of interpretation, which would apply to all questions of a similar character, although the subject matter in relation to which the conclusion is arrived at may be different from that in connection with which the similar new questions may arise." (K. L. Sarkar p. 63).

Proper names have been given to many of the Nyayas. They are generally named after some word or phrase occurring in the subject-matter of the Adhikarana itself or the *Purvapaksha* of the particular case with which the principle of the Nyaya originated. Thus, Adhikarana is identical with Nyaya.

Mimamsa Nyayas superior to those of grammar and logic.

Gopalachariar in his learned treatise *Brahmavadin* (I. 639) remarks regarding the Mimamsa Nyaya :

"The rules (Nyayas) laid down by Jaimini have been implicitly accepted by writers of all schools. The controversial literature of the several Vedanta schools is mainly based upon these Nyayas. This may be verified by a reference to the *Nyayamrita* Advaitasiddhi Tarangini, Brahmanandeeya, Vai amalamisriya, Sarvathasiddhi and other works. The Mimamsa Nyayas are largely quoted in works on grammar, such as the *Manjusia* and *Sabdakaustubha*. The Nyayas of Tarka and Vyakhrana are not considered to be of universal application like those of the Mimamsa. The Tarka Nyayas are often rejected by

writers of other schools. The Vyakarana Nyayas are very rarely admitted to be of application outside the science of grammar "

SECTION 5. THE HINDU AND THE ENGLISH SYSTEMS OF INTERPRETATION COMPARED

It has been shown above that the Hindu system of interpretation has a number of elementary rules as axioms like those of Euclid's Geometry. These axioms lay down general principles of interpretation relating to the properties of words and sentences, as Euclid deals with the properties of lines and figures, *etc.* "When by these general properties the meaning of a particular word or a particular sentence is self-evident, this is called *Śruti*. When the meaning is doubtful, then by examining the properties of words in the particular case the meaning is to be cleared up: this is called *Linga*. But when the doubt has to be removed by examining the properties of particular sentences, it is called *Vakya*. Again, when a proposition is to be understood with reference to the necessary connections between the different parts of the topic, it is called *Prakarana*." Besides these—*Śruti*, *Linga*, *Vakya* and *Prakarana*—particular propositions have been formulated, which fall under one or other of these heads with regard to concrete cases. These are termed *Nyayas* or maxims.

The Hindu system of the Mimamsic rules is thus both scientific and theoretical.

It has been shown how the principles of *Śruti*, *Linga*, *Vakya* and *Prakarana* are similar in almost every respect to the principles of interpretation as laid down by Maxwell. A comparison of the opening passages of Maxwell in his famous treatise with that of Savara Swami in the very first page of his *Bhashya* will be profitable:

"The 'object of all interpretation (of it) is to determine what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it. When the intention is expressed, the task is one of verbal construction only; but when the statute expresses no intention on a question to which it gives rise, and yet some intention must necessarily be imputed to the legislature regarding it, the interpreter has to determine it by inference grounded on certain legal principles." The passage of Savara *Bhashya* is almost to the same effect, though it is more discursive and states that after reading the *Vedas* one must try to realise their import. The learned author then raises the question that if the intention is once realised as being that of teaching *Dharma*, what is the need of further efforts to interpret the *Vedas*? He himself

answers the query by saying that whether a given act agrees with the intention of the Vedas or not it has got to be explained. He further says :—

“Even if the Veda has been proved to be the only means of knowing duty,—with regard to the ascertainment of the meaning of Vedic passages, there is no agreement among learned people (lit. ‘people knowing many things’) on account of various (kinds of) doubts. Some say “this is the meaning;”—some, “not that, but this,”—and it is also for the settlement of these (differences of opinion with regard to the meaning of Vedic passages) that the treatise, subsequent to this (1st *pada*), has been composed.” [Savara Bhashya, p. 2. (Jibananda Vidyasagara’s Edition)].

धर्मं प्रति हि विप्रतिपन्ना बहुविदः—केचिदन्यं धर्ममाहुः केचिदन्यम् ।

सोऽयमविचार्य प्रवर्त्तमानः कश्चिदेवोपपाद्वानो विद्वन्येतन्नर्थं च ऋच्छेत् ।

तस्माद्धर्मो जिज्ञासितव्य इति, सहि निःश्रेयसेन पुरुषं संयुनक्तीति प्रतिजानीमहे ।

Maxwell has also said in clear terms that the sole object of interpretation is to ascertain the intention. Where an expression of the intention is required to be known but is not found, it has to be presumed according to certain principles. There is, however, some difference in the methods of the two systems; but the Mimamsa rules substantially agree with the rules of construction as laid down by the English jurists.

Illegality means and implies an act in contravention of some rule, the result of which is to make the act void. But **Illegality and irregularity.** *irregularity* implies an act in contravention of a rule the result of which does not make the act void. In the former case, the violated rule is imperative, while in the latter it is merely directory or regulatory. This distinction has been made in the Hindu system of jurisprudence; for instance, as to the Vedic rites it is enjoined that the Angas must be performed or the Yajna will be void, while some are merely matters of Niyama, which make it merely a little defective. ‘Perform the *Agnihotra* with curdled milk’ is a rule by which the use of curdled milk is made an *Anga* (essential part); it cannot be dispensed with, while the direction ‘beat the wheat to unhusk it’ is a Niyama. Jimutavahana also says that the direction to a man to dispose of his self-acquired property is a mere precept so that his relatives may not be distressed, and a violation thereof will not make the alienation void. This is called the doctrine of *factum valet*. Thus the cases of irregularity and

those of illegality have been clearly distinguished by the Hindu jurists.

There are two sorts of ambiguities, patent and latent; the one, where the instrument appears ambiguous on the face of it, the other when collateral matters of the instrument give rise to ambiguity, though the instrument itself on its face appears certain enough. In patent ambiguity the written instrument must be construed with reference to its own terms; but a latent ambiguity (which in truth grows out of this application of the language to facts and circumstances) is raised by matters parole, and hence may be removed by the same means. The difference between the two is that if on perusal one sees no ambiguity, but there is nevertheless an uncertainty as to its application, the ambiguity is latent; but if he detects the ambiguity from merely reading the instrument, it is patent. These terms are generally used with reference to private documents. But passages in statutes may also happen to fall under either of the two categories. In the case of patent ambiguity the passages are to be discarded, while in the other case the help of extrinsic evidence or circumstances is permitted to ascertain the intended meaning. This is the law according to modern jurisprudence.

The Hindu jurists have not laid down the law on the subject in so clear words. A patent conflict is a case of *Pratishedha* (simultaneous injunction and prohibition) resulting in an option, for example, the texts: "Use the *Shodasi* vessel in the dead of night" and "Do not use the *Shodasi* vessel in the dead of night." The *Mimansakas* deal with the subject in connection with their topic of avoiding *Anarthakya* (meaninglessness). In the *Mimansa* system the rule regarding patent ambiguity is that the jurists should not easily take a word or sentence to be self-contradictory or absolutely uncertain of meaning but should try to correct the language by means of *Linga*, *Vakya* or the *Prakarana* principle. They give a meaning to such incoherent expressions as "the vegetables performed sacrifice for a session." By what is called the *Kaimutika Nyaya* (what and again maxim), they explain the expression to mean that man should certainly perform sacrifices as even the vegetables did once upon a time. The sentence "there should be no altar of brick in the firmament or in the heavens" is not allowed to be considered as absurd. However, these are met in the *Vedas*; and so they must be anyhow understood in some sense (α). Similar is the case with the *Smritis* which are less sacred than the *Vedas*. Even today an interpreter of a statute is bound to extend due respect to the legislative authorities. Therefore, it can be safely said that the regard or the respect accorded to the sacred law is its need

RULES AS TO CONFLICT OF LAWS AND THEIR COMPARISON WITH
MODERN PRINCIPLES

(A). When Shruti texts conflict.

(B). When there is a conflict of Smriti texts.

(1) As amongst themselves, each text is to be understood as applicable to the context in which it is used.

श्रुते द्वेधे स्म द्वेधे स्थलभेदः प्रकल्पते ।

(2) There is no doubt a general rule that solves a number of difficulties ; but suppose an occasion arises in which a Smriti text is opposed to Shruti text, be it not forgotten that there is very little chance of this happening, for Shruti texts never speak of law at all ; but if at all the occurrence takes place, the rule is " where the Shruti and Smriti are opposed, the Shruti alone will prevail " The rule is :

श्रुतिस्मृति विरोधेन श्रुतिरेव गरीयसी ।

(3) But the question cannot stop here. We perfectly know that different Smritis are not the products of the same age. They speak of different times, and are the records of different ages. Therefore, it will be no wonder that two Smritis conflict. The rule is, therefore, where two Smritis conflict, the decision should be by a special reference to rules of law as determined by usage.

स्मृत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः ।

अर्थशास्त्रस्तु बलवद्धर्मशास्त्रमिति स्मृतिः ॥

(4) Science of Law has greater authority than the science of politics.

(5) Custom is transcendental law.

The next class of writings which are considered as authorities in Hindu Law, are commentaries. They are of two classes. (1) Commentaries on texts, that is, commentaries on any particular Smritis, just as Mitakshara, a running commentary on the text of Yajnyavalkya. (2) Nibandha, digests of all texts. The scope of these Tikas and Nibandhas is to explain the apparent or real conflict among the Smritis. Though, therefore, the professed object of the commentator is to interpret the text in the guise of interpretation, the commentators and Nibandha writers made new rules and explained away the contrary precept of the Smritis by forced interpretations. Whatever that may be according to modern principles, it has been held by the Judicial Committee in *Collector of Madura v. Mooto Rama Linga* : "The duty of the European Judge, who is under the obligation to administer Hindu Law, is not so much to inquire whatever a disputed doctrine is fairly

deduceable from the earliest authority, as to ascertain whether it has been received by that particular school which governs the district with which he has to deal, and has been sanctioned by usage." Under the Hindu system of law, *clear proof of usage will out-weigh the written text of law*.

It is well established that whatever may be the law intended to be laid down by the Smṛiti-writers, that law must be sought for in the writings of the commentators. In determining what is *stidhana* according to a particular school, what the Court has to do is to look to what the commentators, who are the authorities in that particular school, have said on the subject. Custom is one of the three sources of Hindu Law. Where there is a conflict between a custom and the text of Smṛitis the custom overrides the text.

आचारः परमो धर्मः शास्त्राद्भूविर्लोक्यसी ।

व्यवहारो हि बलवान् धर्मस्तेनावधीयते ॥ [Narada II, 24-26].

(6) In a conflict between any text and its commentary by a recognised authority, the latter should prevail as reflecting the existing custom (x).

(7) Lastly, when all these rules fail, the act which is enjoined by one text and forbidden by another should be taken as an optional one.

SECTION 6. MIMANSA PRINCIPLES OF INTERPRETATION

So long as words and sentences carry their ordinary meaning, there is no difficulty at all, and they are taken and followed for whatever they lay down; but the difficulty would arise, when any text is found to be in apparent conflict with usage or is not as complete and expressive as it ought to be, and when the rules of interpretation laid down in Mimansa for interpreting and reading the Vedic text are invoked, and a passage or passages are explained accordingly.

Just as *Vidhi* became necessary for the proper understanding of Vedas, so also the science of interpretation came to be understood as one of the accompaniments to the course of Vedic studies, and Mimansa grew up as an independent faculty of studies.

The importance and use of Mimansa is most ably stated by *Colebrooke* in the following words :—"It will be observed as has been intimated in speaking of the members of an *ADHIKARANA* in the

(x) *Atmaram v. Bajirao* 1935 P. C. 57.

Mimansa that a case is proposed, either specified in Jaimini text or supplied by his scholiasts. Upon this a doubt or question is raised, and a solution of it is suggested, which is refuted, and a right conclusion established in its stead. This *disquisition of the Mimansa* bears therefore a certain resemblance of *juridical questions* and in fact the Hindu Law, being blended with the religion of the people, the same modes of reasoning are applicable and applied to the one as to the other. *The logic of the Mimansa is the logic of the law*, the rule of interpretation of civil and religious ordinances. Each case is examined and determined upon general principles, and from the cases decided, principles may be collected. A well-worded arrangement of them would constitute the Philosophy of Law, and this is in truth what has been attempted in Mimansa. Jaimini's arrangement, however, is not philosophical, and I am not acquainted with any elementary work of this school in which a better distribution has been achieved."

Though Jaimini's rules were meant for sacrificial and ceremonial observances, there are not a few instances in which they were freely applied in regard to Vyavahara or positive law.

The earliest example of this is Apastamba when he establishes the *equal rights of sons* to father's wealth.

Vijnaneshwar makes use of these Mimansa rules in various cases and a clear example is that when he establishes the right of a widow. But the exegetic value of these rules though for the purpose of establishing his own story has been illustrated in the most patent form by Jimutavahana in the first chapter of Dayabhaga in the discussion on the following text of Manu :

उर्ध्वं पितुश्च मातुश्च समेत्य भ्रातरः समम् ।

भजेरन् पैतृकं रिक्थमनीशास्तेहि जीवतोः ॥

The text is quite clear and plain. Now let us see how by recourse to these rules of interpretation, he twists the text. Jimutavahana says that this text cannot be a Niyam, for it is certainly not meant that any sin is incurred by not dividing. Manu himself has declared in another text that it is optional with the co-parcener to remain joint or to separate. The text is not a Vidhi for the act of division may be done out of natural impulse irrespective of the rules of the Shastras.

It is not a Paisankhya, for it is not proper ordinarily to accept an interpretation which makes a text of law Paisankhya.

The conclusion is, therefore, arrived at that it is an Anuvada, but it is a necessary Anuvada, and therefore there can be no objection to its being accepted in that light.

What is meant is that the sons become owners after the death of

the father. If the sons be owners then the right to divide follows as a matter of course. The declaration that the sons may divide paternal wealth is Anuvada, but it is meant to apply that sons become owners after father's death, and not before, and therefore, the text is a necessary one.

The above discussion will make it clear that free use was made of these rules by Mitakshara and Dayabhaga, nay, even their reasoning and logic in some cases is based upon the reasoning and logic of these rules. In one case *Radha Mohan v Hardai Bibi* a rule of Jaimini assumed great importance. The text to be interpreted was that of Vashistha :

न त्वेकः पुत्रो दद्यात् प्रतिगृह्णीयाद् वा ।

स हि सन्तानाय पूर्वेषाम् ॥

"Let no man give or receive an only son, since he must remain to raise up the progeny for the obsequies of ancestors."

Let us see what Jaimini has to say.

अथैव हेतुवन्निगदा :—शूर्पेण जुहोति, तेनहि अन्नं क्रीयते इत्येवामदयः
तेषु संवेदः क्लिश्नाति तेषां कार्यमुक्तहेतुः

"Now in regard to such text (निगदा) having a clause assigning reason as one should sacrifice by means of शूर्प for by means of that food is prepared." A doubt arises as to whether they are simply commendatory or contain a reason making them obligatory. Jaimini's final reply to this query is तस्मात् हेतुवन्निगदस्यापि स्तुतिरेव कार्यम् । "therefore the import of text having a clause that contains a reason is commendation only "

Now the above text of Vashistha with regard to the character of which a great question arose before their Lordships of the Privy Council in *Radha Mohan v. Hardai Bibi* (21 All. 460) must also be treated as a recommendatory one, inasmuch as it contains a precept that is intended for a certain specified purpose. The rule of Jaimini, stated above, makes it clear that all texts supported by assigning of reason are to be deemed not as Vidhi but simply as Arthavada (recommendatory).

When the Judicial Committee had to deal with this matter in appeal, they say of Jaimini's rule "That, if sound, would be conclusive as to Vashistha's text; but it is rather startling and very intimate acquaintance with the Smritis would be needed before admitting its truth. It has not been brought forward in any case, prior to this Allahabad case. It may however be fairly argued that one who having the power to give an absolute command, gives an injunction not expressed in unambiguous terms of absolute command, but resting on a reason, is

addressing himself rather to the *moral* sense of his hearers, than to their duty of implicit obedience."

If the learned counsels arguing before their Lordships are ignorant of Jaimini's Sūtras and their application to the texts, we are sorry for it; then Lordships' doubt is nothing more or less than the doubt which some English Lawyers used to express. "Has such a thing as Hindu Law ever existed or Sanskrit,"

The decision of the Calcutta High Court where it applied the legal maxim, **सकृत् कृते कृतः शास्त्रार्थः** "an act enjoined by the Śāstras need not be performed more than once" in *Gyanendro Chandra Laliri v. Kalla Palur* (9 Cal 59) relating to the validity of the simultaneous adoption was based upon this principle.

Another fact that gives the Mīmāṃsā the high place of importance, is the nature of the sources of Hindu Law, the principal among which are the Śrūti and the Smṛiti. The *very nature of these works necessitates the existence of rules* which may serve as guides in determining the exact meaning attributed to a particular passage.

The first source is the *Śrūti* or the *Vedas*. The *Vedas* were the

**Importance of
Mīmāṃsā rules
due to the nature
of the sources of
Hindu Law.**

repositories of all learning and their study was a paramount duty, and the several *Vedāṅgas* and systems owe their origin and development to the study of the *Vedas*. The Vedic study gave an advancement to the science of interpretation and

the *Mīmāṃsā* grew up as an independent faculty of Sanskrit studies. According to the old tradition it has two divisions—the **पूर्वमीमांसा** *Purva Mīmāṃsā* of Jaimini and the **उत्तरमीमांसा** *Uttara Mīmāṃsā* of Śrī Bādarāyaṇa. The interpretation of the ritual contained in the *Vedas* has been dealt with by the *Purva Mīmāṃsā* and though the ritualistic portion is now of an academic interest, yet the logic and the line of reasoning propounded in this system have obtained general authority and the *Mīmāṃsā* is now regarded as the sole guide as to matters of interpretation. The very nature of the two premier sources of our Hindu Law—the *Śrūti* and *Smṛiti*, necessitates a reference to rules which may serve as a guide in determining the exact meaning attributable to particular passages. In case of special statutory enactments the matter would be quite different, any vagueness or indefiniteness can be removed by statutes either explaining or amending the old ones, but our divine system of law is beyond any human touch and cannot be varied in any way.

The subject of interpretation involves two questions :

(1) *What is the meaning and intention of a particular word, sentence or passage?*

(2) *Whether it constitutes an obligatory rule of any kind, or a quasi-obligatory rule of a non-obligatory matter?*

The Vedas indicate, though occasionally, the germs of the Mimansa principles. The Dharma Sutras of Gautama and Apastamba also indicate the same. They lay down the following principles: (1) Smṛiti or practice (*Achāra*) is no authority, when it is in direct conflict with a Śruti; (2) Where contradictory methods of performing the same acts are prescribed by authorities of equal force, one may adopt either optionally; (3) Kalpa Sutras are not Vedas but only their Angas. These principles are respectively the subjects of *Smṛitya-adhikarana*, *Vikalpadhikarana* and *Kalpa-sutradhikarana* of the Mimansa. The Smritis also contain a few rules, but they are meagre and mainly relate to cases of conflict. But Jaimini's Sutras deal fully with the rules of interpretation with reference to both the questions, *e.g.*, that of determining the meaning and interpretation of words and sentences, and of ascertaining their precise legal character. The rules and principles dealt with by the sutras may be divided into the following five classes:—

Class I. Certain elementary principles which may be called the axioms of interpretation.

**Classification
of the Mimansa
rules of inter-
pretation.**

Class II. General principles as to the interpretation of words and texts.

Class III A large number of specific rules and settled points called Nyayas (maxims), each applying to a particular case.

Class IV. Certain broad and general principles as regards the application of texts.

Class V. Certain rules specially bearing upon the *character and interpretation* of Smṛiti texts and usages.

These five classes have been elaborately dealt with in the following chapters.

The **axioms** are such elementary propositions regarding interpretation as are taken to be self-evident. The **general principles** are those principles which are arrived at after an examination of those materials with which an interpreter has generally to deal, such as, meaning of words, structure of sentences, the relation of topics, *etc.* The **Nyayas** are formulas applicable to particular cases or specified circumstances.

CHAPTER II

AXIOMS OF INTERPRETATION

SECTION I. INTRODUCTION

The elementary principles or the axioms of interpretation which precede its general discussion, must be treated first. They are called axioms, as they, *i. e.*, the Mimamsa self-evident principles and the Mimamsa general principles regarding words and sentences, bear on the specific Mimamsa propositions called the Nyayas, or maxims, in the same way as axioms, postulates and general principles of the properties of figures bear on the specific propositions of Euclid. These axioms are:

I. Sarthakya—*Every word and sentence must have some meaning and purpose.*

II. Laghava—*Where one rule or proposition would suffice, more must not be given.*

III. Arthaikatva—*To a word or sentence occurring at one and the same place, a double meaning should not be attached.*

IV. Gunapradhana—*If a word or sentence which, on the face of it, purports to express a subordinate sense clashes with the principal idea, the former must be adjusted to the latter or altogether disregarded.*

V. Samanjasya—*Contradiction between words and sentences is not to be presumed where it is possible to reconcile them.*

VI. Vikalpa—*When there is a real contradiction, one of the contradictory matters may be adopted at option.*

SECTION 2. SIX AXIOMS OF INTERPRETATION

“Every word and sentence must have some meaning and purpose attached to it.” Karika has explained this axiom in a very few expressive words, “More words, more meaning”. शब्दाधिक्यात् अर्थाधिक्यम् । It means that if the sense which is attached to a passage is borne out by a part of it, then the remaining portion must give an additional sense, otherwise the construction would be defective. The mistake of interpreting a passage so as to leave some part of it without any meaning is called *Anarthakya* or the fault of assuming

First axiom:
Sarthakya.

Anarthakya.

meaninglessness. While dealing with the subject of Arthavada, Jaimini puts the objection thus, "whatever enjoins an action is *Anuaya* (Veda), but there are numerous passages which do not contain such an injunction; they must, therefore, be *Anarthaka* (meaningless). Hence the Vedas, having this *Anarthakyadosha*, cannot claim the perfection of eternity." **आज्ञायस्य क्रियार्थत्वादानर्थक्यमतदर्शनाम्** [I. ii. 1]. The answer is: "They are not meaningless, each of them is part and parcel of some Vidhi (command enjoining action). Thus it is an expatiation of some particular Vidhi. This expatiation (*stuti*) expresses a meaning." **विधिनात्वेकवाक्यत्वात् स्तुत्यर्थेन विधीनां स्युः** । [I. ii. 7]. Expatriation or '*stuti*' is taken as the equivalent of *Prashastya*, meaning 'that which makes a thing clear.' Such passages make the meaning and purpose of a Vidhi explicit.

The same elementary principle of Anarthakya and Arthakya is applied to the illustrative maxim called "**Vidhibannigadadhikarana**" (a declaration appearing like a Vidhi). It would be better illustrated by the following passage as given by Jaimini [Bk. I. Ch. ii, Sutras 22—24]: "The Indian fig tree becomes the sacrificial post, it is strong; strong animals are available; therefore, a strong animal is to be had to match the strength of the sacrificial post."

औदुम्बरोयुषोभवत्युर्गवा उदुम्बर उर्कपशव उज्जैवास्मा उर्जं पशुन्नाप्नोति उर्जोवरुण्यै इति । [Jaim. I. ii. 19]

The objector says: "Here in this passage there is clearly an indication of duty enjoined by the concluding part of the passage, if not, the whole passage, as a declaration would be meaningless (*Anarthakatva*)."**विधिर्वास्यादपूर्वत्वाद्वाद्मात्रं ह्यनर्थकम्** ॥ [Jaim. I. ii. 19]. The author replies: 'No doubt the passage has the appearance of a Vidhi, but it is really a declaration extolling the virtue of a fig-tree; for, to regard it as a Vidhi would be to make other Vidhis useless and redundant."

Illustrations from Digests : Digest writers have also availed themselves of this principle as is evident from the following examples:

Jimutavahana discusses the meaning of the passage of Katyayana [Colebrooke's work Ch. II. Sec. 67], "A father is the taker of a double share or of a half from acquisition of son-property."**द्वयंशहरोऽर्द्धहरो वा पुत्रवित्तार्जनात् पिता ।** [Day. Ch. II. 67].

The construction put by Jimutavahana on this passage is that "a father takes either a double share or a moiety of his son's acquired

wealth," पुत्रस्य वित्ताज्जनात् पितृद्वयंशहरत्वं अर्द्धहरत्वं वेत्यस्यार्थः [Daybhga II. 66].

In interpreting the passage in this way he refutes the other interpretation that the father is entitled to a double share or a half of the property, if he has got both the son and the property. The effect of this construction would be that one who has not got a son to share with, would take the whole property and he indignantly points out, 'But is not this some thing meaningless.' For it is an admitted rule that in cases of partition among relatives, say brothers, if one has acquired wealth and has no son, he takes a double share of his acquisition, why then this redundant proposition regarding the son? In short, he says that if Katyayana meant by the expression 'from acquisition of son-property' to say 'from the fact of having acquired both son and property' and not 'from property acquired by the son,' then he would be guilty of *Anarthakya-dosha* (fault of redundancy), for there is already the general rule that one who has acquired property and who has got relatives to share it with takes a double share.

In paragraph 79, chapter II, Jimutavahana again says : " Besides, if the mention of greater or less shares here intend the regulated deductions, the second verse of the stanza 'let him separate his sons according to his pleasure' becomes superfluous ; for that, which was to be declared, is fully specified in three other verses of that text. But, according to our interpretation, the phrase, 'let him separate his sons according to his pleasure' relates to his own acquired wealth ; while the allotment of the best share, and an equal distribution, both relate to an estate inherited from the grandfather There is consequently nothing superfluous."

किञ्च उद्धारामिप्रायेण समन्यूनधिकत्वं वर्णने इच्छया विभजेदित्यनर्थकं पदं एतदितरपदत्रयेणैव वक्तव्यं स्यामिद्विधात् असन्मते तु इच्छया विभजेदिति स्वीपात्तं धनं विषयं श्रेष्ठांशता समानांशतयोस्तु पैतामहं धनगोचरत्वमिति न किमप्यनर्थकम् ।

Then again in para 8, section 1, Chapter XI, Jimutavahana emphasises the principle by which an interpretation involving an assumption of tautology is to be avoided. Regarding the widow's right of succession he says : "The meaning, therefore, is, 'the wife shall obtain her husband's entire share' not 'she shall obtain her own entire share;' for the direction, that 'she shall obtain' would be impertinent in respect of her own complete share. Since the intention of the text is to declare a right of property it ought not to be interpreted as declaring such right in regard to the person's own share ; for, that is

known already from the enunciation of it as that person's share, and it need not, therefore, be declared]."

भर्तुः कृत्स्नमंशं पत्नी लभेत न तु स्वांशं कृत्स्नमित्यर्थः कृत्स्नं स्वांशोद्देशेन लभेतेति विधानानुपपत्तेः स्वामिभाव ज्ञापनार्थत्वादस्य न च स्वांशे स्वामिभावज्ञापनमर्थति स्वांशं ज्ञापने नैव ज्ञातत्वात्

[Dayabhaga Ch. XI Sec. I]

This first axiom has been universally recognised in other systems of law as well, and there is a leading English case, *Reg. v. Bishop of Oxford* (L. R. 42 Q. B. D. 245) in which it has been held : "A statute ought to be so construed, that if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant."

"The construction which makes the meaning simpler and shorter is to be preferred." गौरवः दोषः It enunciates the simple rule that when one rule or proposition would suffice, more must not be assumed. Madhvarchariya explains the principle in his first Adhikarana of Ch. I. Bk. II and quotes the following slokas of Jaiminiya Nyayamalavistara II, 1. 1. :

विधिवाक्यं पदैः सर्वैरपूर्वप्रतिपाद्यते ।
प्रत्येकमथवैकेन सर्वैस्तत्प्रतिपादनम् ॥
फलान्वयित्वात्सर्वेषां प्रधानान्वयलाभतः ।
लाघवादेक बोध्यत्वं तच्छेषस्तुपदान्तरम् ॥

"The Apurva sanction of a Vidhi proposition is made out by all terms composing it."

"Whether by each term separately or by one term out of them is the question." The answer is : "By investigating the relation of the fruit (Apurva-sanction) it is found to belong to a single term which is the principal one to which others are subordinate."

"This being the simple construction, the Apurva appertains to one term, the rest forming its train."

He then explains that if Apurva be ascribed to each term, it would involve the fault of 'Gaurava' (useless multiplicity) ; whereas, ascribing it to one term only constitutes it 'Laghava' (simpler construction) and is, therefore, to be preferred. This is the explanation of Gaurava as given in Nyayamalavistara.

The Holaka maxim is the outcome of this axiom. When a Vedic rule (Sranta Vidhi) is to be presumed as corresponding to a rule of the Smritis or a matter of usage, it must be in the simplest and most general form. For example: "Let the usage of the Holaka be observed."

It should not be allowed to deal with other complexities as to where or how it should be observed. According to our Mimansakas the Vidhi should be short and simple; and complicated questions incidental to a Vidhi may be dealt with by rules of the nature of Prayoga Vidhis.

Jimutavahana's explanation of the Gaurava principle may now be considered in connection with the illustration relating to the division among brothers, of wealth acquired by exertions *etc.* of one brother. A number of texts collected from the Smritis and taken together show that what is gained by the valour or exertions of one brother with the aid of the common stock should be brought under partition, the acquirer merely taking a double share. But when a property is acquired by the exertions of one brother without the aid of the common stock that property as well as affectionate gifts to him should not be partitioned as they are his self-acquisitions. Jimutavahana then raises a question as to how the law on the subject is to be expressed whether all the cases in which property is not to be partitioned among others are to be stated and then other cases in which property may be subject to partition be set-forth? He himself answers that it would involve serious complication and, following the Holaka maxim, states the rule in a simple form: "Divide the wealth acquired with the use of the common stock." It would include cases in which property was acquired by valour and skill *etc.* of one brother with the aid of the common stock but would exclude all cases in which it was acquired either by valour or otherwise, without the aid of the common stock. The English system of jurisprudence also lays down that construction should not be burdensome.

"A double meaning should not be attached to a word or sentence occurring at one and the same place."

Third axiom:
Arthaikatva.

This axiom should be considered first in connection with the interpretation of words and then in connection with that of sentences. As regards a word or a clause it is evident that if it occurs at different places, it may have different meanings, but when used at one and the same place it cannot bear different sense. This has been aptly expressed in the proposition, "A word once uttered must have only one meaning."

सकृदुच्चरितः शब्दः सकृदेवार्थं गमयति ।

The following illustration from the Dayabhaga explains this axiom better:—

(1) "The *mother* should be made an equal sharer." **समांशहारिणी**

माता [Ch. III. Sec. 1. 29]

Jimutavahana says, "since by the term 'mother' is intended the natural parent, it cannot also mean a step-mother. For a word employed once cannot bear the literal and metaphorical senses at the same time." [Ch. III. Sec. 1. para. 30.]

समांशं हारिणी मातेतिवचनात् मातृ पदस्य जननी परत्वात् न सपत्नी
मातृपरत्वमपि सङ्गत् श्रुतस्य मुख्यगौणत्वानुपपत्तेः ।

As regards sentences, it is clear that when a word is used in two senses, the whole sentence in which it is so used will have a double meaning. This use of a word in a double sense is termed *Vakyabheda* i.e., splitting a sentence.

**Vakyabheda
from ambiguity
of words.**

The expressions उद्भिदा यजेत *Udbhida Yajeta* (perform the ceremony by the vegetable) and श्येनेन यजेत *Shyenena Yajeta* (perform the ceremony by the hawk) will illustrate the point. If *Udbhida* the vegetable or the term *Shyenena* the hawk be taken to be the names of ceremony as well as to denote the use of vegetable products in the case of the one and the use of the hawk in the other, then there would be the error of *Vakyabheda* according to the Mimamsakas. So they say that in order to avoid this fault these terms must be taken as proper names of certain ceremonies without any reference to their denotation.

A sentence (*Vakya*) is defined by Jaimini (II. i. 46) to be, "a proposition containing a single idea, but where the expression of that idea is divided into parts, each part stands in need of the other or others."

अर्थैकत्वादेकं वाक्यं साक्षाद्भूतं चेद्विभागे स्यात् ॥

Thus the fundamental rule of composition in Sanskrit literature is that there should be only one leading idea in one sentence. A single *Vakya* cannot be interpreted to contain two co-ordinate ideas so as, in effect, to make it as if it were, two *Vakyas*. The splitting up of a sentence in this way is called *Vakyabheda*. "Where it is possible to take a sentence as embodying a single idea or a single proposition, it is wrong to attribute two ideas or two propositions to it."

सम्भवत्येकवाक्यत्वं वाक्यभेदो न युज्यते Jaimini has very clearly laid down this proposition in Sutra 25. Ch. II. Bk. I., "If in the text which is the subject of *Vidhubannigadadhikarana* the last portion be read as a *Vidhi* as well as the first portion, then this will cause the fault of *Vakyabheda*." विधौ च वाक्यभेदः स्यात् ॥

The effect of this principle of presuming a sentence to have only one leading idea is that where a word or a clause expresses an

injunction, the other connected part or parts must be treated as subsidiary clauses (*Vakyashesha*) and as mere Arthavadas. An 'Arthavada' clause cannot therefore be allowed to be raised to the rank of an injunction (*Vidhi*) as in that case it will amount to giving a double meaning to one and the same clause. In later law-books, such as, of Vijnaneshwara and Jimutavahana, the texts of the nature of an Arthavada are usually called moral precepts as opposed to *Vidhis* proper. A moral precept is a proposition to indicate some salutary truth which is involved in a *Vidhi*, and so it is practically of the nature of an Arthavada. When Jimutavahana discusses that text regarding the duty of an owner not to alienate his property to the detriment of the interests of his children and others, he speaks of it only as imposing a moral duty, not in any way derogating from his right of full ownership. He in fact regards the text in the light of an Arthavada and, as such, would not allow it to be reckoned as a *Vidhi* affecting the *Vidhi* creating ownership.

"If a word or sentence purporting to express subordinate idea clash with the principal idea, the former must be adjusted to the latter or must be disregarded altogether."

Fourth axiom:
Gunapradhana.

This principle is generally expressed by the maxim "the great and the small fish" i. e. the great fish eating up the small. In Sutra 9 Ch. III, Bk. III of Jaimini, we come across the following :

गुणमुख्यव्यतिक्रमे तदर्थत्वात् मुख्येन वेद संयोगः ॥

"When a *Guna Sruti* (auxiliary clause) clashes with a *Mukhya Sruti* (mandatory clause), the latter is to prevail as Veda."

Jaimini again lays down in Sutra 39 Ch. III, Bk VI: **इत्यायां तद्गुणत्वाद्भिषेकेन नियम्येत ॥**

"When a purpose and a material conflict, the purpose is to be given effect to (somehow) in the absence of another suitable material, for materials are accessory as regards the primary object."

K L. Sarkar in his learned treatise (at p. 90) has very nicely explained how *Uha* and *Badha* illustrate this axiom: "Here the conflict spoken of is between the purpose of a *Vidhi* and a material expressly prescribed for use in it. Even in such a case where there is an express provision for a material, the material is either to be modified or done away with when it is found to militate against the purpose. The application of this axiom is very

Uha and Badha, illustrations of this axiom.

largely illustrated by what are called *Uha* and *Badha*. *Yajnas* which are called *Vikriti* and which owe their origin to some imperfect *Vidhi* text have to draw upon the

stock of some other *Yajna* for their details. Thus details must be modified to suit the Vidhi text of the *Vikriti Yajna* formed as above. When the detail consists of the application of a particular Mantra, the language of such a Mantra must be modified to suit the *Vikriti Yajna*. This among other things is called Uha. When parts of the detail to be borrowed as above, are altogether inconsistent with the main *Vikriti Yajna*, such parts are to be dropped off. This is called Badha. Uha and Badha will be fully explained later on. Here I refer them to show that they are illustrations of the axiom that what is auxiliary on the face of it should be modified or given up to suit that to which it is or should be auxiliary."

"In the Vedic law the Utpatti Vidhi or that which directly enjoins an act for acquisition of heavenly bliss is the principal (*Mukhya*) law. Injunctions regarding appliances to carry out the above act are called Vinyoga Vidhis. So these are comparatively subordinate. Then there is another class of Vidhis (rules) which merely lay down the manner in which the Vinyoga Vidhis are to be carried out. These are called Guna Vidhis, which are clearly subordinate. They are subordinate in the second degree, being subordinate to the Vinyoga Vidhis which are themselves subordinate to the Utpatti Vidhi. Then again. Arthavadas and Namadheyas, as explained before, are subordinate in a still greater degree. In a case of conflict between the text of a lower grade and one of a higher grade, the former must yield to the latter."

"The above phraseology, no doubt, is peculiar to the Vedic law. But the same principle of adjustment applies to the positive law contained in Vyavahara Kanda of the Smritis. It is only in respect of the nomenclature that the Vedic law and the Vyavahara law differ. In the Vyavahara law, practically there is no Utpatti Vidhi. The Vidhis of the highest and perfect obligation in the Smritis correspond to the Vinyoga Vidhis of the Vedas. But all the same there is the distinction in the Vyavahara law between a principal Vidhi and a subordinate Vidhi; for instance, as regards adoption the provision regarding the act of adoption is of higher importance than the Vidhis setting the details of the manner of adoption. So, if in any case a rule regarding the details should have the effect of upsetting the principal rule enjoining adoption, the rule regarding the details must give way. You have instances of this in the Law of Adoption. Of course express and clear subordinate rules have the same force as the principal rules when there is no conflict."

Fifth axiom:
Samanjasya.

"*Contradiction should not be too easily assumed.*"
Jaimini has laid down this principle in his

first book in Sutra 9 Chapter II thus : "The inconsistencies (you assert) are not actually found. The conflicts consist in difference of application (of the injunction) The real injunction is not affected by application. Therefore there is consistency."

अप्राप्ता चानुपपत्तिः प्रयोगे हि विरोधः स्याच्छ्रद्धार्थस्त्वप्रयोगभूतस्तस्मादुपपद्येत ।

This principle means that the proper course for reconciling apparently conflicting texts is to see whether they apply to different sets of facts and to different purposes. The conflict or the contradiction between texts is generally apparent and it can be reconciled by treating one as an Arthavada. Jaimini, in the second Adhikarana Ch. VIII,

**Reconciliation
by Arthavada
principle.**

Book X has stated that although apparently the prohibition of the two *ajyabhagas* (*Tan pasan*) in the Soma Yaga is contradictory to the character of that Yaga, yet it is really not so. There is no provision for Ajyabhaga in the Soma Yaga, therefore, the prohibition is merely an Arthavada in praise of the Yaga making explicit what is implicit.

नतौ पशौ करोतीत्यादि निषेधस्यार्थवादताधिकरणम् ।

अपूर्वे सोमे नैव आज्यभागौ प्राप्तस्तन्मात्र प्रतिशोधः ।

प्रशंसार्थः सोमे आज्यभागौ न क्रियेते पशावपीति । [Jaimini X. viii. 2 Savara Bhashya].

The Sutra, the basis of the Adhikarana distinctly says : " (In a case of conflict) with what is an Apurva Vidhi the conflicting text (should be taken as an Arthavada)". **अपूर्वे चार्थवादः स्यात् ।** [Jaimini X. viii. 5]

It is a very difficult task to reconcile a positive and a negative text, and for this purpose one has to see the character of the negative text. If it is in the nature of a Pratishedha (prohibition pure and simple) it would be very difficult to reconcile it with a text affirming the thing prohibited. But if it is a Paryudasa (a qualified or partial prohibition) which Jaimini treats as merely an Arthavada, there will be no conflict. In some cases a Paryudasa is only a Niyama in the sense of not being imperative. A positive Vidhi may be either imperative or directory or one laying down a Kratu Dharma (positive duty) or a Manushya Dharma (moral duty). Similarly a negative Vidhi may be of either character.

An illustration : Jimutavahana used Paryudasa as an exception in para 36. sec. 1, Ch. VI where he says that if the several texts regarding self-acquisition are Paryudasa (exceptions), then all possible cases of self-acquisition must be regarded as exceptions to partible property. In the next para 37, he says that the several texts regarding self-acquisitions are not meant as exceptions, but are given only as illustrative cases. In the latter para he observes that where

there is a negative rule embodying a number of instances, but there is no exhaustive enumeration of the cases which are intended to be covered thereby, the negative rule cannot be a Paryudasa. The instances are merely in the nature of an Arthavada of a negative character.

This conflict may also be removed by interpreting the texts as referring to different subject matters: The following illustration will explain the point. With regard to the right of sons born after partition Jimutavahana has cited two sets of texts apparently not consistent with each other. One of the sets is as follows:—

**Reconciliation
by referring to
different subject
matters.**

उद्धवं विभागाज्जातस्तु पित्र्यमेव हरेद्धनम् ।

संस्पृष्टास्तेन वा ये स्युर्विभजेत स तैः सह ॥

“A son, born after a division shall alone take the paternal wealth; or he shall participate with such [of the brethren,] as are re-united with the [father].” (Manu and Narada).

विभक्तजः पित्र्यमेव ।

“A son, begotten after partition, takes exclusively the wealth of his father.” (Gautama).

पुत्रैः सह विभक्तेन पित्रा यत् स्वयमर्जितम् ।

विभक्तजस्य तत् सर्वमनीशाः पूर्वजाः स्मृताः ॥

यथा धने तथर्षेऽपि दानाधानक्रयेषु च ।

“All the wealth which is acquired by the father himself, who has made a partition with his sons, goes to the sons begotten by him after the partition. Those, born before it, are declared to have no right; as in the wealth so in the debts likewise, and in gifts, pledges and purchases.” (Vrihaspati).

The other set is:—

पितृविभक्ता विभक्तानन्तरोत्पन्नस्य विभागं दद्युरिति ।

“Sons, with whom the father has made a partition, should give a share to the son born after the distribution.” (Vishnu)

विभक्तषु सुतोजातः सवर्णायां विभागभाक् ।

दृश्याद्वा तद्विभागः स्य दायव्ययविशोधितात् ॥

“When the sons have been separated (after their father's death) one afterwards born of a woman equal in class, shares the distribution. But the allotment of a son (in the womb not known to any at the partition), must positively be made, out of the visible estate and he will get the surplus of the income after deducting the expenditure of the father's share.” (Yajnavalkya II, 122).

Jimutavahana reconciles these two sets of texts by saying that the former set applies to cases of self-acquired property of the father,

in which case the partition by the father is a matter of his own choice, and that the latter set applies to the case of property descended from the grandfather in which case a partition effected before the mother is past child bearing age is not recognised as valid.

"When there is a real contradiction, one of
Sixth axiom : *the contradictory matters may be adopted at*
Vikalpa. *option."*

The contradiction can be explained when one of the two texts is a Paryudasa (exception) or where they are referable to different sets of facts, as explained above. But in case of real contradiction between Vedic texts they are placed at the discretion of those whom they concern and the principle of option has been allowed by the Mīmāṃsakas as a last resort. The Smritis are of a derivative authority from one and the same Vidhi-command, so the interpreter is bound to reconcile them.

The exercise of option would be allowed only when the conflict between two Vedic Vidhis which are of a co-ordinate character, is clear, patent and direct, and the positive Vidhi must be one addressed to the senses. Jaimini's third Adhikarana, Chapter VIII, Book X, illustrates this point by reference to the use of the *Shorashi* vessel at the dead of night, in one of which the use of it is enjoined and in the other prohibited. नातिरात्रे गृह्णाति षोडशितमिति निषेधस्य विकल्परूपताधिकरणम्
 When there is direct and clear conflict the one or the other text can be followed at one's option.

The case of option does not arise when a negative Vidhi does not contain an absolute prohibition (Pratishedha) but merely a qualified prohibition (Paryudasa). By way of illustration reference may be made to Jaimini's first Adhikarana Ch. VIII, Bk X, the leading clause of which contains the general injunction for the performance of a certain act *vis.* uttering certain words in a certain transaction with a clause added to it prohibiting that act in a part of the same transaction महापितृ यज्ञे ... ये यजामहे इति पञ्चाक्षरं करोति नानुयाजेषु यजामहं करोति. This prohibition is a Paryudasa and a sort of an exception, so there is no conflict, and no question of option arises in this case.

According to the English principle of interpretation, if one provision of law is contradicted by a subsequent one, the latter provision prevails as having a repealing character. In the Vedas there is no such presumption of one command being subsequent to another in point of time. Option is allowed where the contradiction cannot possibly be explained away. It is allowed only as the last resort as option means ignoring the authority not only of one but of two texts.

CHAPTER III

GENERAL PRINCIPLES OF THE MIMANSA RULES OF INTERPRETATION

SECTION I. INTRODUCTION

The general principles of the Mimansa rules of interpretation in the words of K. L. Saikar, the learned Tagore Law Professor (x), are as follows :—

When a verb and the case governed by it have a self-evident meaning and thus form a complete and independent sentence, this is called a *Sruti*; no attempt should be made to strain or twist its meaning. This may be called the Sruti principle of construction (a).

When the meaning of a word or expression is not clear on the face of it, and its latent force or suggestive power has to be brought out by the suggestive power of some other word or expression, this is called a *Linga*; and this principle of construction may be called the Linga principle (b).

Where what is apparently a complete sentence has, in order to make out a satisfactory sense, to be read as part of a sentence connecting it with some other clause, this is called a matter of *Vakya* or syntactical arrangement. The principle of construction consisting of this process is called the *Vakya* principle of construction (c).

When a sentence or clause by itself does not indicate its purpose but its purpose becomes clear when read with some other text appertaining to some other topic, this is called a case of *Prakarana*. The principle of construction herein involved is called the *Prakarana* principle of construction (d).

These principles form the science of interpretation of the Hindu system of Law and they are its backbone.

(x) Page 99.

(a) Sabara Bhasya III, iii, 14, p. 313 Jibananda's Edition; Laugakshi Bhaskara, p. 3; Partha Sarathi Misra's Shashtra Dipika p. 229; Apadeva, p. 14 Jibananda Vidyasagara's Edition.

(b) Sabara Bhasya III, iii, 14, Jibananda Vidyasagara's Edition p. 313; Laugakshi Bhaskara p. 6; Salikanath Misra's Prakarana Panchika, p. 3 (Benares edition); Apadeva's Mimansa Nyaya Prakasha, p. 19; Medhatithi's Commentary on sloka 3, Ch. 1, Manu.

(c) Sabara Bhasya III, iii, 14; Jibananda Vidyasagara's Edition p. 313; Laugakshi Bhaskara p. 7; Kumārila Bhatta's Tantra Vartika p. 535; Apadeva's Mimansa Nyaya Prakasha p. 22; Jibananda Vidyasagara's Edition; Raghunandana's Prayaschittatva p. 480.

(d) Sabara Bhasya III, iii, 14; Laugakshi Bhaskara p. 8; Apadeva's Mimansa Nyaya Prakasha p. 26; Jibananda Vidyasagara's Edition; Raghunandana's Prayaschittatva p. 479.

SECTION 2. THE FOUR PRINCIPLES

The term Sruti has a wide meaning in Sastriic Literature. It is treated as a synonym of the Vedas, but it has been used in a special sense in the Mimansa, where the term Veda or Amnaya **आज्ञायः** is used in place of the Vedas. Sruti is always used to refer to a passage of the Vedas which clearly expresses its meaning and intention as soon as it is pronounced, e. g., Savara Bhashya III. iii. 14 p. 313 (Jibananda's edition) **यदर्थस्याभिधानं शब्दस्य श्रवणादेवावगम्यते स श्रुत्यावगम्यते श्रवणं श्रुतिः ।** Sruti is a text which requires no extraneous aid for its meaning to be understood. Parthe Sarathi Misra in his treatise, 'Shastradipika' (p. 299, Benares edition) says, "When an expression is capable of application on the bare hearing of it, it is a Sruti." Laughlakshi Bhashikara and Apadeva define Sruti to be "an independent pronouncement" **निरपेक्षः स्वः श्रुतिः**

The expression literal construction is, therefore, equivalent to the Sruti construction of the old Aryans. Kumarila Bhatta would not call any text Sruti unless it gives a clear sense on the face of it. He says, "The sense in Sruti is on the face of it, while the sense in a Vakya is far-fetched." **श्रुत्यर्थः सन्निकृष्टत्वं वाक्यार्थो विप्रकृष्टता ।** [Tantra-vartika p. 535, Benares edition]. The same idea has been expressed by Maxwell (at p. 4) in the following passage :

"When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation. *Absoluta sententia expositore non eget.* Such language best declares, without more, the intention of the lawgiver, and is decisive of it."

According to the old Sanskrit composition, a Vidhi proposition must be short and simple containing a nominative case, a transitive verb and an objective case. When there is no doubt about the meaning of the verb and the objective case, the sentence is clearly a Sruti. For example : **येन्द्रया गार्हपत्यमुपतिष्ठते ।** "By the Mantra addressed to Indra establish the household fire." The expression 'establish the household fire' is clear and explicit; so it is a Sruti.

The cardinal principle of interpretation is that where an independent proposition is stated in clear grammatical language, that proposition must be accepted as it is, however disagreeable it may be. The interpreters cannot twist and distort it to suit their own views. This is called the literal principle. This principle has been admitted by the author of

Importance of the Sruti principle.

the Aphorisms of hoary antiquity and has also been recognised by modern civilized countries. Jaimini [III. iii. 14] says that where this rule is applicable, no other rules of interpretation should be resorted to.

श्रुतिलिङ्गवाक्यप्रकरणस्थानसमाख्यानं समवाये पारदौर्बल्यमर्थविप्रकर्षात् ॥
In other words, the literal construction or Sruti construction is a principle which deprecates artificial construction. In cases when the language is not clear or the sense is not explicit or when the words are ambiguous in sense, or the sense is dependent on some other idea, the interpreter may have recourse to other methods of construction.

The principle of literal construction has been recognised by **English Law.** Maxwell also who says :—

“Where, by the use of clear and unequivocal language, capable of only one meaning anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous. If the words go beyond what was probably the intention, effect must nevertheless be given to them. They cannot be construed, contrary to this meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the intention conveyed may be, it must receive its full effect. When once the intention is plain it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.”

Linga, Vakya and Prakarana are rules of interpretation of an artificial character as compared with the Sruti rule. Linga determines the meaning of a word or a clause in the light of another word or another clause, without joining the other word or the clause to it as part and parcel of the same sentence. **यत् तावच्छब्दस्यार्थमभिधातुम् सामर्थ्यं तल्लिङ्गम् ।** [Savara Bhashya III. iii. 14.]

Laugakshi Bhaskara has also explained this ‘suggestive power’ **शब्दसामर्थ्यं तल्लिङ्गम् ।** According to Savara Bhashya (III. iii. 11), Vakya is the principle of making out a proposition by reading together apparently disjointed words and clauses **संहृत्य अर्थमभिधत्ति पदानि वाक्यम् ।** So Vakya relates to the structure of the sentence, while Linga relates to the meaning of which a word or sentence is susceptible from appearance. Savara Bhashya (III. iii. 11) explains Prakarana as the principle where a clause is subordinate on the face of it, occurs isolatedly without its principal and is connected by the logic of the subject with some principal clause which is more or less incomplete without it.

असंयुक्तं प्रकरणात् इतिकर्तव्यतार्थित्वात् यत् असंयुक्तं श्रुत्या लिङ्गेन वाक्येन वा तत् प्रकरणात् इतिकर्तव्यतार्थित्वात् । Laughakshi Bhashkara also says उभयाकाङ्क्षा प्रकरणम् । K L. Sankar (at p. 103) has explained their relative position thus : "Linga requires extrinsic light in the shape of what is suggested by something else. The Vakya requires the addition or insertion of some wanting links in the shape of words or clauses and the Prakarana requires reference to an object or purpose elsewhere expressed. In all the three cases there is a want or susceptibility in the word or clause which engages your attention, and that want or susceptibility is satisfied by something outside. But what is a Sruti has no want by its definition. So when a clause or sentence that engages your attention is a Sruti *i. e.*, independent and clear in meaning, you need not resort to the other modes of construction. You will further see that when the text that engages your attention is not a Sruti *i. e.*, not absolutely clear in meaning, that next least onerous method to determine its meaning is by the light or the suggestive power of other clauses (Linga), and not by trying to reconstruct the sentence by bringing in other words or other clauses. This latter process (Vakya) should only be resorted to failing the former. Again, if an object and purpose of a clause or sentence be found by either availing of some extrinsic light (*i. e.* by the Linga) or by reading the clause or sentence with words or clauses added to it in a proper manner (*i. e.*, by the Vakya), then one should not proceed to seek its purpose and object elsewhere In each of the three cases there is a want and a supply of that want, but the thing wanted is different in each case. In the case of the Linga what is wanted and supplied is a certain light regarding the significance or the effect of certain words. In the case of Vakya, however, there is an expectancy *Akanksha* in a phrase or clause for some other phrase or clause which together with the former would express one complete idea, in other words, would constitute one complete sentence. So here the want is of some words or phrases. Again in the case of Prakarana the want is that of a purpose in a clause or sentence representing a detail, while there is another clause or sentence which has the purpose but which is more or less in need of the detail."

Kunte, the author of *Saddarshanachintanika* (at p. 687-691) also remarks :

"The Mimansakas define Sruti or a direct statement to be a word or a sentence which at the first sight conveys its sense, about the interpretation of which no argument or reasoning is necessary, which does not necessitate the analysis of compound terms or the consideration of its etymology. They define Linga to be that which involves the

consideration of the derivation and etymology of a word, and employs inference in settling the sense either of a word or a sentence. One consistent sense is conveyed to the mind by a variety of words bearing different relationships to one another, and arranged in an order prescribed by the rules of grammar. The evidential power of such a sense is exegetically called a *Vakya*, which we have translated by the *syntactical construction of a sentence*. It is recognised by the Mimamsakas as method of proof interpreting a passage. Why is the syntactical construction or its exegetical power considered to be a method of exegetical proof by the Mimamsakas? Because in interpreting a passage, it is necessary to determine whether a given sentence is a simple or complex, single or compound, subordinate or co-ordinate, divisible or non-divisible sentence ... That method of exegetical proof which examines the relationship between different subjects treated of in a passage, which distinguished the principal subject from those merely subordinate and conducive to its elucidation, and which determines the interpretation of a given passage is called by the Mimamsakas *Prakarana*."

"Each of the three principles, *Sruti*, *Linga* and *Vakya* has a two-fold application. The *Sruti* is either a word or a sentence the intention of which is self-evident. The *Linga* is either the implied sense of a word or of a sentence. The *Vakya* is the making out of a proposition either by joining together apparently disjointed words, or by joining together apparently disjointed sentences" (p. 106).

Regarding *Sruti*, Laugakshi Bhashkara (Dr. Thibaut's translation) says:—"Direct statement (*Sruti*, literally 'text') we define as irrespective of independent words (words which intimate their sense directly without any intermediate steps of the nature of those required by the other means of proof.)" As regards *Linga*, he says, "The suggestive power of all words is *Linga*" शब्दसामर्थ्यं लिङ्गम् । यथाहुः सामर्थ्यं सर्वशब्दानां लिङ्गमित्यभिधीयते ॥ He defines *Vakya* to be 'syntactical connection,' समसिध्याहारो वाक्यम् ॥ Dr. Thibaut translates the whole passage as follows: "By sentence or syntactical connection (*Vakya*) we understand common employment and by this term we understand the connected enunciation of two words denoting two things which in reality stand to each other in the relation of principal and subsidiary, although this is not indicated by second case affixes *etc.*, directly indicating the one of the two things to be the thing to be accomplished by the other *etc.*, (which relations are directly indicated by *Vibhakti-Sruti* *etc.*.)" *Prakarana* is defined by him to be "the relation of interdependence between passages," उभयाकाङ्क्षा प्रकरणम् ।

**Laugakshi
Bhashkara's ex-
planation of the
four principle.**

Apadeva defines Sruti to be "an independent pronouncement."

Apadeva's explanation of the four principles.

His explanation is the same as that of Laugakshi. He points out that an applicatory Vidhi is a Sruti when its applicatory character is evident on the very pronouncement of the words composing it. यस्य च शब्दस्य श्रवणादेव सम्बन्धः प्रतीयते सा विनियोजनी । आपदेवः । Then he shows that *artha* of a word means its self-evident meaning, while *Lakshananartha* means the sense gathered by implication स एव हि शब्दस्यार्थो यः प्रकारान्तरेण न लभ्यते अन्यलभ्यः शब्दार्थ इति न्यायात् अतएव न गङ्गापदस्य तीरमर्थः लक्षणयव प्रतिपत्ति सम्भवात् । आपदेवः । Apadeva has defined *Linga* as the suggestive power of ideas.

It has been shown how an applicatory Vidhi is made out by the suggestive power of ideas, and when so made out, it is implied (*Kalpya*) समर्थं सर्वभावानालिङ्गं । ; while an applicatory Vidhi by Sruti is direct (*pratyakshya*) लिङ्गादिषु नप्रत्यक्षो विनियोजकः शब्दोऽस्ति किन्तु कल्प्यः । As regards the principle of *Linga*, Laugakshi points out that the suggestive power or the light which indicates the true meaning is to be supposed in the word or clause, the meaning of which is to be explained, while Apadeva says that according to the great Rishi Jaimini himself, it is to be supposed in the word or clause which assists the explanation, and which is distinct from the word or clause requiring explanation. This difference is of no importance as when a word or phrase is explained in the light of another word or phrase, the explanation is effected between the two. The word or phrase requiring an explanation has a latent power (*Sakti*) to explain itself, as it is prone to receiving light from outside.

Apadeva applies the principle of *Vakya* to the case of an applicatory Vidhi in this way that an applicatory Vidhi is direct when a thing enjoined to be used is put as the objective case of the verb expressing command. 'But when it is not so put, as in the case of the text—he whose *Juha* is made of *Parnaved* etc.,—here one has to make out by reading all the words of the text together that the making of the *Juha* is the object of an injunction. This is an instance of the *Vakya* principle. He says that such a case amounts to reading (by importing) a command (*Sheshi*) with the object of command (*sheshah*)' [p 103].

समभिध्याहारो नाम साध्यसाधनत्वादि वाचकः द्वितीयाद्यभावे वस्तुतः शेषशेषिणोः सहोच्चारणं यथा यस्य पर्णमयी जुहुर्मवतीति ।

As regards *Prakarana*, Apadeva says that the object of *Prakarana* is to show the manner in which an injunction is to be carried out. It cannot indicate the materials which are required for the fulfilment of

the injunction. They must be indicated by a Sruti or a Linga.

सिद्धस्यतुद्रव्यादेः केवलमङ्गत्वं तदपि श्रुत्यादिना नतु प्रकरणात् ।

Kumarila Bhatta says:—"To take what has a manifest sense in a larger or smaller sense is to incur the fault of attributing inferential or double sense. Therefore this is not to be supposed."

Kumarila Bhatta's explanation.

श्रूयमाणस्य वाक्यस्य न्यूनाधिकविकल्पने । लक्षणा वाक्यभेदादिदोषो नानुमितेह्यसौ ।

The enlarged meaning of the word *nirapeksha* 'independent' in the definition of Sruti—"Independent pronouncement is Sruti", has been explained in the following passage [Tantravartika, Ch. III, pada 1, Benares edition p. 659]:—"A Sruti no doubt is expressive of its own meaning. Sometimes, however, it clears up what goes before. Thus though it acts for the benefit of another thing, it is by way of supplying a pre-existing want."

श्रुत्या तावत्तदर्थत्वं क्वचित्पूर्वं प्रतीयते ।

अन्यत्रागुपकारित्वादपेक्षामात्रपूर्वकम् ॥

Bhatta explains Sruti to be a Vidhi or Viniyoga or an *Ukti* (an injunction, an applicatory proposition or a declaration.) **विभ्युक्ति विनियोगः ।** He interprets Linga to be *Shabdasya Ukti Shakti* (the declaratory force of words) **शब्दस्योक्तिः सामर्थ्यः ।** It is clear that in both of these definitions there is *Ukti* or declaration; so he says that Sruti and Linga overlap each other. The following passage may be quoted [*Ibid* p. 839]: "A Sruti being either an injunction or a declaration or an applicatory proposition, each of these is made out by a declaratory force of words and is not without such force. Again, take the instance of Linga in the idea of Indra (implied by the word *Garhapatya*) it is not without the element of Sruti so far as a Sruti is a declaration."

विभ्युक्तिविनियोगा हि न विना शब्दशक्तिभिः ।

न चेन्द्र शब्दसामर्थ्यमभिधाश्रुति वर्जितम् ॥

Bhatta thus discriminates between Sruti and Linga and raises the objection that the definitions appear to be faulty and to overlap each other.

He himself also refutes the objection thus: "True apparently they overlap" **सत्यमुभयत्रोभयमप्यस्ति ।** 'But when you understand the proposition usually given as an instance of Sruti, viz., Aindra Garhapatya etc., the understanding is not by the declaratory or suggestive power of any word, but you understand it because its

meaning is self-evident. Also when you understand *garhapatya* to mean *Indra* you do not realise this meaning by the literal principle of this Sruti."

किन्त्वैन्द्रयागार्हपत्यस्य नोक्तिशक्त्यावगम्यते ।

इन्द्राङ्गत्वमतिश्चास्या नाक्षर अतिकारिता ॥

Further in connection with an applicatory proposition he says : " In one case (*i. e.*, in the case of Sruti) in the absence of the suggestive power, the mantra by itself operates as an applicatory Vidhi (*shesha*). In the other, the sense of this applicatory Vidhi not being expressed, the suggestive power is availed of."

एकत्रासति सामर्थ्ये मन्त्रशेषोभिधीयते ।

अन्यत्रानुशेषत्वं सामर्थ्यं संप्रतीयते ॥

Eventually Bhatta lays down the rule that when a word has a clear and obvious meaning, it is a Sruti. But when the meaning is realized by implication, it is the case of a Linga.

Bhatta similarly deals with and discriminates between Vakya on the one hand and Sruti and Linga on the other. He says, "No Vakya whatever can exist devoid of the suggestive power of words, of a declaratory character and in the vicinity of other clauses." नहि किञ्चिदपि वाक्यं शब्दसामर्थ्येनार्थाभिधानेन पादान्तर सन्निधानेन वा विना विद्यते । So a Vakya contains Linga and Sruti as well as its own features of being affected by collocation. This objection is explained thus : "It departing from the self-evident meaning you assume ' *Garhapatya upatisthate* ' to mean ' *Indra upatisthate* ' by applying the Linga, in either case there is a Vakya; why then assume superfluous things (Sruti and Linga)."

लिङ्गत्वमभ्युपेतं चेदिन्द्रोपस्थानकल्पने ।

उभयत्रापि वाक्यत्वम् कथं भूयोवकल्पते ॥

The following passage answers the objection. "In Vakya the sense is not cleared by suggestive power nor is it a self-evident applicatory Vidhi, being only a proper association of terms directly perceived."

अर्थप्रति न सामर्थ्यं न च शेषत्वमुच्यते ।

केवलं पदसंघातः प्रत्यक्षमुपलभ्यते ॥

The sense of the above passage is that a sentence which is made intelligible by Linga may be in form a Vakya and so also a sentence which is clear in meaning. But such cases are practically excluded from the Mimansa conception of a Vakya according to which only the

case of making out sense by examining and arranging the collocation of words and clauses is called Vakya (a). Accordingly it is said : 'Where devoid of Linga and the like a Vakya serves to give shape to a Vidhi, not, however, when joined with these it merges into nothingness' (b).

लिङ्गादिरहिते वाक्ये तदा विधिरूपेयते ।
न कथंचिद् यदा युक्त्या प्राप्तिलेशोऽपि गम्यते ॥

Again it is observed that where so-called clauses had no meaning before, to construe them into a single proposition is Vakya (c). यत् न प्राग्वाक्यार्थं तदेकस्तावधारणमस्तीति । The following passage from Slokavartika [Adhi. 7, Sloka 92] may be quoted with advantage in this connection: "By Vakya you get as if a special sense by (considering) its own structure." येन स्वार्थाविरोधेन विशेष उपजन्मते ।

Bhatta discriminates Vakya Prakarana thus: the latter is defined to be a passage which has a relation of interdependence with another passage, while in the former also a clause to which other clauses are to be added in order to form a Vakya, stands, so to say, in expectancy (*akanksha*) of such other clauses. There appears no material difference between the two. The only difference is that in a Vakya the parts are joined grammatically as members of the same sentence, whereas in the case of a Prakarana there is no such integral organic connection. Thus in many respects a Vakya is a Prakarana plus a syntactical connection, as is evident from Bhattapada (d). "In Vakya there is a direct union which is not the case in Prakarana. A Prakarana is brought in by mere want, hence it is inferior to a Vakya" (e). p. 880].

प्रत्यक्षासङ्गति वाक्ये न च प्रकरणेस्तय सौ ।
आकाङ्क्षातोऽनुमातव्या तावता विप्रकृष्टता ॥

The discriminating features of Sruti, Linga and Vakya were originally given by Savaraswami in his learned treatise "the Jaimini Bhashya," subsequently enlarged and annotated by Kumarila Bhatta. The prominent features of these were explained by him by referring to the text: "By Indra mantra establish the *Garhapatya*." This mantra is admittedly a Sruti, and as such not open to construction by the Linga principle. The Swami asks the following questions, "What is that in it which makes it a Sruti? What is that in it which might make it liable to construction by Linga." [Savara Bhashya III. iii. 14].

(a) K. L. Sarkar *Atmansa Rules of Interpretation* p. 123.
(b) *Ibid* p. 919.

(c) *Ibid* p. 426.
(d) *Ibid* p. 850.
(e) *Ibid* p. 880.

का पुनः अत्र श्रुतिः ? किं लिङ्गम् ? The above questions are answered thus ; "In the above, Sruti is (appreciating the sense of) the word *Garhapatya* by the very utterance thereof. What again is Linga ? It is the force of the passage :—"Even protect thou Indra and not injure thy servant." By this force Indra is shown to be a particular deity and thus in the text in question *viz.*, *Andra Garhapatyam upatisthate Garhapatya* might mean *Indra*."

श्रुतिगार्हपत्यं शब्दश्रवणम् लिङ्गं पुनः कदाचनस्तरीरसि नेन्द्रसश्चसि दाशुषे इति इन्द्र शब्दस्य विशिष्टदेवताभिधानसामर्थ्यम् ।

"Now what is Vakya ? It is a number of words (or expressions) collectively making out a proposition." अथ किं वाक्यं नाम ? संहृत्य अर्थमभिधत्ति पदानि वाक्यम् । The Swami then goes on to say : "If this be the definition of Vakya then the text, 'By Indra-mantra establish the *Garhapatya*' is also a Vakya. So also is the text—"even protect thou Indra and not injure thy servant." यद्येवमिदमपि वाक्यम्, एन्द्रया गार्हपत्यमुपतिष्ठते इति, इदमपि, कदा च नस्तरीरसीति । He then proceeds to explain that the above two texts should not be treated as Vakyas, although they are Vakyas according to the usual idea. He says: Generally speaking the above texts are Vakyas in-as-much as they consist of a collocation of words, all and each of which make out the sense. You are however to differentiate them, one as a Sruti-Vakya the other as a Linga-Vakya and are thus drawn to find out the difference between a Sruti and Vakya, and a Linga and Vakya."

उभयत्रापि संहृत्य अर्थमभिधत्ति पदानि, तेन वाक्यस्व चैषा संप्रधारणा, न श्रुतिलिङ्गयोः यदि वा श्रुतिलिङ्गवाक्यानि विवक्तव्यानि, इदं श्रुतिवाक्ययोः अन्तरम् इदं लिङ्गवाक्ययोः इति [Savara Bhashya III. iii. 14].

"This difference is stated as follows : That power of words which (apart from its manifest sense) tends to lend expressiveness (to other words) is Linga. Where the communication of the sense takes place from the bare utterance, this is called Sruti; to hear is to understand by hearing."

तदभिधीयते, यत् तावच्छब्दस्यार्थमभिधातुम् सामर्थ्यम् तल्लिङ्गम्, यदर्थस्याभिधानं शब्दस्य श्रवणमात्रादेवावगम्यते स श्रुत्याऽवगम्यते श्रवणं श्रुतिः ।

Therefore, a Sruti-Vakya and a Linga-Vakya are distinguished by Savaraswami and he thinks that of the two texts one is a Sruti-Vakya and the other a Linga-Vakya, but no where he says anything as to what a Vakya proper is apart from a Sruti-Vakya and a Linga-Vakya.

Adhikarana Kaumudi is a well known Mimamsa work by Udichya Bhattacharya. He takes a Sruti as the operative part of a Vidhi proposition describing in clear terms the thing to be done by means of the second case termination. He himself realises this narrow view of Sruti and quotes the definition as given by Vachaspati Misra : "A Sruti includes all case terminations, each conveying its proper meaning and expressing a clear sense of the proposition without extrinsic help." वाचस्पतिमिश्रास्तु कारकविभक्तिमात्रं श्रुति सत्त्वासामेव विभक्तीनां प्रकृत्यर्थान्वितस्वार्थबोधेऽन्यनिरपेक्षत्वाद्बलवत्त्वमिति वदन्ति । There is no special treatment of Linga and Vakya which is worth noticing.

With reference to matter, the whole range of Vedic texts is divided into : (1) Vidhi positive and negative, (2) Arthavada (3) Namadheyas ; and with reference to the manner of expression, it may be divided into : (1) rules and expressions directly expressed, (2) rules and propositions constructively made out which may further be sub-divided into : (i) Rules and propositions made out by way of Linga or construction with reference to the suggestive power of words and expressions ; (ii) Rules and propositions arrived at by adjustment of syntactical relations or by the Vakya principle ; and (iii) Rules and propositions got out by an adjustment of the purpose indicated by one passage with reference to that indicated by another, both tending to formulate one transaction ; that is to say, by the Prakarana principle. This latter classification or sub-division holds good for the Smriti works as well.

SECTION 2. THE FOUR PRINCIPLES EXPLAINED

I. THE SRUTI OR LITERAL PRINCIPLE

Taittiriya Samhita has discussed the text in relation to the superiority of the Sruti to the Linga principle, '*Aindrya Garhapatyam upatishthate*.' ऐन्द्रया गार्हपत्यमुपतिष्ठते [4. 2. 5. 4] and it has been explained that where the predicate of a proposition is a Sruti as in the above text *Garhapatyam*, or where it is clear and unambiguous in meaning, the fact that a subordinate word in the sentence raises doubts in the mind of the reader is no ground for interfering with the plain meaning of the Sruti. This is a maxim which has been established after fully discussing this matter and has been termed as *Garhapatyam* maxim. This text has been further discussed thus : *Aindrya* means "by means of the Mantra addressed to Indra" and '*Garhapatyam upatishthate*' means 'establish the household fire-god.' It appears unreasonable to worship the household fire-god by means of a Mantra

invoking Indra, so the objection is raised that the word *Garhaptya* should not be taken in its plain and clear sense of house-hold fire-god, but should be understood to mean Indra, as Indra resembles the fire-god and is also a suitable object of worship. The Linga principle applied to another text is "*Kadachana stariasi nendra sachasi dashushe*" which means, 'thou Indra ever preserve us and not destroy your followers.' Jaimini [III. ii. 3] has opined that the text being a clear *vachana* (expression), the word *Aindri* cannot prevail **वचनास्त्वयथार्थमैन्द्रोऽस्यात्**। It has been further suggested [III. ii. 4] by him that as it is only a subordinate expression, it cannot affect the meaning of the operative expression which is clear on the face of it **गुणाद्वाप्यभिधानं स्यात् सम्बन्धस्याशास्त्रहेतुत्वात्**।

The effect of interpreting the text in this simple way is this : there is no ambiguity as to the meaning of the principal word and there is no doubt as regards its intention; the only difficulty is that it is not reasonable to worship one god with a mantra addressed to another. Maxwell has also laid down an identical principle that a clearly expressed intention cannot be modified on account of any apparent unreasonableness. This maxim shows that when the Sruti and the Linga principles produce opposite results, the former is to prevail. Jaimini has clearly explained this in sutra 41, Ch. i, Bk. IV, "when there is an (express) text, considerations of reasons are of no avail." **वचने हि हेत्वसामर्थे**। The modern Shastric writers have expressed this Sruti principle by the popular saying, "As the expression so the thing expressed" **यथावचनं हि वाचनिकं**। This maxim means that in interpreting the meaning of an expression one should go only to the extent of the power of expression—neither more nor less. This is the sense of the Sruti principle as understood by the modern authors.

The ordinary instances of Sruti are as follows :

स्वर्गकामो अग्निहोत्रं जुहुयात्।

"*Swarga Kamo agnihottram Juhuyat.*"

स्वर्गकामो दर्शपौर्णमासाभ्याम् यजेत।

"*Swarga Kamo darsa pauranamashabhyam yajeta.*"

A Sruti need not necessarily be a Vidhi. An Arthavada or a Guna Vakya may be a Sruti. It requires no construction; rather it is the key of construing other texts which are not so clear and unambiguous. Thus Sruti serves to explain other passages. Now the question arises as to what is the difference between a Sruti and a Linga. The difference is that, in the Linga, the passage or the sentence which throws light is not a Sruti; when such a passage is a Sruti the

construction is regarded as the Sruti principle. Srutis, therefore, are brought to bear upon other texts to remove doubts not so much as to the meaning of these texts as to the mode in which they are to be applied. The following examples illustrate the point. In Sutra 24, Ch. I, Bk. II, it is said "by joining with the Sruti a certain class of passages is invested with the Apurva sanction in the way of a Prakarana." अपि वा श्रुतिसंयोगात् प्रकरणे स्तौतिशंसतो क्रियोत्पत्तिं विद्ध्यताम् ।

In Sutra 5, Ch. ii, Bk. II, the objector says, "Prakaranas which are said to refer to the Purnamasi are really in the nature of general clauses (Gunas) by virtue of a Sruti" गुणस्तु श्रुतिसंयोगात् । In Sutra 2, Ch. IV, Bk. II, with regard to the question whether the text "Agnihotra should be performed life-long" enjoins perpetual performance of the Yaga or from time to time, *an appeal* is made to another Sruti settling the question in favour of the latter meaning "कर्तुर्वा श्रुतिसंयोगात् ।

It is a clear principle that when an authoritative proposition is quite clear and explicit, it is employed to remove doubts in other doubtful cases.

Our present digests of Hindu Law follow the aforesaid four principles *viz.*, Sruti, Linga, Vakya and Prakarana, but under different designations. For instance, Jimutavahana in para 29, Ch. I, using the Sruti Principle says :—

"Therefore, the text of Manu must be argued [by you] to intend the prohibiting of partition, although the son's right subsists during the life of the father. But that is not maintainable. For it would thus bear an import not its own."

p. 123 (1).

अतो जीवति सत्यपि पुत्राणां स्वाम्ये विभागनिषेधार्थं मनुवचनं वाच्यं तच्चान्यार्यं अस्वार्थपरत्वापत्तेः ।

He means to say that in the text of Manu the words "they have not power over it, while their parents live" clearly means that the sons have no such right during the life-time of their father. If you ignore this, you are guilty of violating the Sruti principle of interpretation. Lakshna Artha has been used in place of Linga and Upalakshana for Prakarana by the same author.

II. THE LINGA PRINCIPLE

The Sruti or literal principle is one of loyalty and faithfulness, but the other principles are based more or less on critical reasoning. In the legal world, loyalty is of greater importance than critical reasoning. It is on this account that the Sruti principle is preferred to others.

The word 'Linga' has two meanings—a general sense and a special

Mimansa sense like Sruti—one conveying a wide and general meaning to denote any text of the Vedas, and the other a special meaning signifying the literal principle of interpretation. Linga in general means a peculiar sign which is invariably connected with a matter so that the former indicates the latter, while in the Mimansa sense it means the *suggestive power of words and ideas*. Laugakshi Bhaskara has defined Linga as being the suggestive power of words सामर्थ्यं सर्वशब्दानां लिङ्गमित्यभिधीयते । Apadeva has also defined it in the same way, but more comprehensively सामर्थ्यं सर्वभावानां लिङ्गमित्यभिधीयते । Jaimini and other sutra writers use the term Linga in its comprehensive sense. A critical consideration will show that it is of *two kinds*, that is to say when the ambiguity and the doubt regarding the meaning and effect of a word or a sentence are removed (1) by the suggestive power of some particular word or words in the sentence itself or (2) by some other passage which bears upon it. Apadeva also says : “Linga is of two kinds—that which depends on some extrinsic evidence having a relation with the passage in question and that which is independent of such extrinsic help.” तच्च लिङ्गं द्विविधं सामान्यसम्बन्धबोधक-प्रमाणान्तरापेक्षं तदनपेक्षञ्च । (०). This fact is illustrated by him in the text “*Barhi devasadanam dami.*”

(I cut the grass for making a seat for the gods) the suggestive power which points to the word “dami” being used in the sense of cutting proceeds from a Prakarana of the Darsapaurnamasi Yaga अतोऽवश्यं प्रकरणादि सामान्यसम्बन्धबोधकं स्वीकार्यं (०). Sree Bhatta Sankara also in his learned treatise, ‘Mimansa Balaprakash’ explains the dual character of Linga, and says that where the suggestive power of the words of a sentence explains the meaning, Linga is aided by Ekavakyata, i. e., the Vakya principle is sought in aid.

In Slokavartika written by Kumarila Bhatta the word ‘Linga’ has been used to denote the matter which suggests the meaning, while ‘Lingi’ to signify that of which the meaning is suggested. He has explained in detail that Linga must not be an imaginary thing but some fact which is directly perceived. “Where one to whom a consciousness of the suggested meaning of words arises from the suggestive power of some other matter of which one is conscious by direct perception, for such a one there is nothing more to be desired.” अत्यन्ताऽवगताङ्गिकाद्यस्य लिङ्गितिर्भवेत् तस्य नातोऽधिकं किञ्चित्प्रार्थनोयं प्रसज्यते [Slokavartika, Anumanana Chapter, Sloka 169].

Even in a case where the consciousness of the suggested meaning of certain matter is due to the suggestive power of a matter which is

inferred, the inference of the existence of the suggestive matter must be based on facts directly perceived."

यत्राप्यनुमिताल्लिङ्गाल्लिङ्गिनि ग्रहणं भवेत् ।

तत्रापि मौलिकं लिङ्गं प्रत्यक्षादवगम्यते ॥

[Ibid 170].

Barhi Nyaya (grass maxim, बर्हिःन्यायः : well illustrates the Linga

**Illustration of
Linga Principle
by Barhi maxim.**

principle by the following text : बर्हि देवसदनं दाम ।

"Oh grass! I do something (dami) for making a seat for the gods." The first doubt regarding the meaning and force of this text is whether it is merely the direct report of an address made by a votary or it is an applicatory injunction enjoining a duty. This doubt is cleared by the Mantra-Linga which lays down that although a mantra (hymn) is a vocative declaration, it has a suggestive power which goes to show that its purpose is to lay down an applicatory Vidhi. This proposition has been laid down by Jaimini in Sūta 1, Ch. ii, Bk. III.

अर्थाभिधानसामर्थ्यान्मन्त्रेषु शेषभावः स्यात्तस्मादुत्पत्तिसम्बन्धोऽर्थेन नित्यसंयोगात् ।

In this case, cutting the grass for making seats for gods, is a prakarana of the Darshapauranmasi Yajna, and this is indicated by the suggestive power of the texts relating to that Yajna.

The next important question is, what is the duty enjoined by it ? i. e., what is the meaning of the word 'dami' ? It is,—to prepare a seat for the gods. In order to know the precise character of the act it is essential to know the exact meaning of the word 'dami', which can be done by ascertaining the meaning of *Barhi*, as it is to *Barhi* that the address is directed. The meaning of the word '*Barhi*' will serve as the Linga to the meaning of the word 'dami' and the force of the whole text will become apparent.

Barhi has two meanings (1) *Kusa* grass (2) *Ulpa* grass. If its first meaning be accepted, then 'dami' will mean 'I cut' and the meaning of the whole sentence will be 'I cut *Kusa* grass to make a seat for the gods.' If *Ulpa* grass be taken as the meaning of *Barhi*, the sentence will have another meaning. Therefore *Barhi* must be taken to mean *Kusa* grass in the primary sense, the other meaning being only secondary or figurative. So the text would mean—"I cut *Kusa* grass to make a seat for the gods." The mantra, therefore, imposed the duty of cutting *Kusa* grass तेनाङ्गत्वं यथा बर्हिदेवसदनं दामीत्यस्य लवनाङ्गत्वं सहि लवणप्रकाशयितुम् समर्थः [Mimansa Nyaya Prakasha p. 19]. If *Ulpa* grass would have been understood by *Barhi* then probably *dami* would not have meant

'I cut'. Laugakshi Bhashikara in his Artha Sangraha (p. 69) concludes the maxim thus, "By this the force of the Mantra is shown to be that Kusa is to be cut and not *Ulapa*. By the Linga thereof (*i. e.* of *Barhi*) it has the suggestive power of showing that it is to be cut." तेन वह्निदेव सदनं दामीति मन्त्रस्य कुशलवनाङ्गत्वं नतु उलपादि लवनाङ्गत्वं तस्य वह्निदामीति लिङ्गात् तल्लवनं प्रकाशयितुमस्ममर्थात् । From the last sentence it is clear that the suggestive power of the word is to clear up the meaning of the word 'dami' to be 'I cut.' But the first sentence is not clear on the point. In another passage Laugakshi takes a narrow view of the scope of Linga and says: "Suggestive power is like the conventional sense of words, it being different from an etymological sense, the sense of compound words (deriving their meaning from the component parts) being different from Linga words which are based on conventional meaning."

सामर्थ्यं वह्निरेव तेन समाख्यातो भेदः ।

यौगिक शब्द समाख्यातो रूढ्यात्मक लिङ्गशब्दस्य भिन्नत्वात् ॥

The Linga principle of construction not only implies the suggestive power of words but also the suggestive power of ideas or rather of association of ideas.

Pranabhrit maxim. The Pranabhrit Adhikarana प्राणभृदादिशब्दानां स्तुत्यर्थताधिकरणम् [Jaimini I. iv. 17] which is based on Sutra 28, Ch. IV, Bk. I, illustrates the Linga of the latter class and shows how words acquire a purely conventional meaning by the Linga process. In Taittiriya Samhita [p. 5. 3. 1. 2] there is a passage: "He disposes the Pranabhrit." प्राणभृत उपधाति । Again in the same Samhita [5. 7. 2. 5] there is a similar passage: "He disposes the Ajyani." आज्यानीरेता उपधाति ॥ Now what is the meaning of Pranabhrit in the one case and of Ajyani in the other? The words 'Pranabhrit' and 'Ajyani' are respectively the names of two Mantras or verses which begin with those words. These verses are used in consecrating bricks required for certain purposes. From this fact the bricks consecrated by the Pranabhrit Mantra acquired the name of Pranabhrit. Similarly the bricks consecrated by the Ajyani Mantra acquired the name of Ajyani. But in course of time the whole heap of bricks of a particular kind came to be called Pranabhrit because one or two bricks of that heap were consecrated as Pranabhrit bricks. Thus the instance of Pranabhrit becomes a maxim for extending the scope of a name in the above manner. And the instance of the Pranabhrit and that of Ajyani being similar, the one supports the other. In fact, the meaning

of the words *Pranabhrit* and *Ajyani* in these cases is determined by the peculiar association of the words and by the context of the passages in which they are used. Such a use is therefore called *Lingasambhaya* (embodiment of the Linga) (a).

Other equivalent terms. Lakshana Artha is often used instead of Linga, which Jaimini himself identifies with Linga. Jimutavahana in section 3, Chapter IV in construing a text of Yajnavalkya in the light of the suggestive power of another text of Manu and also in paras 17 and 18, section 2, chapter IV where he discusses whether interpretation by the suggestive principle is applicable to the case which he was considering in those sections, used the word Lakshana Artha in the same sense as the Linga.

Difference between Linga and Artha. Jaimini treats Linga as the index of a passage found in another passage while 'artha' conveys more or less its ordinary meaning or purpose. His Sutra [I. vii. 2] यस्य लिङ्गमर्थं योगादभिधानवत् "the Linga of a passage (found in another passage) being joined with its purpose becomes a gloss on it" clearly expresses that its *indicia* or suggestive power as found in another passage coupled with its own purpose becomes, as it were, a gloss on itself.

Sruti and Linga. The difference between Sruti and Linga is well illustrated by the text *Aindra Garhapatyam Upatishthate*. *Garhapatya* means the sacred fire or household sacred fire and *upatishthate* means establishing fire. This is the Sruti meaning of the expression. But *Garhapatya* may mean Indra thus. The Mantra, "*kadachana starirasi nendrasaschasi dashuste*. (Thou Indra ever preserve and not destroy us) indicates *Indra* to be household deity. By the suggestive power of the Mantra "*Kadachan starirasi, etc*, *Garhapatya* in the text means Indra. In this case *Aindra Garhapatyam Upatishthate* is the Linga, the matter, the meaning of which is suggested and the Mantra *Nu stagirasi etc.* is the Linga.

Digest writers regarding Linga. In Dattaka Mimansa Nanda Pandit referring to *Pranabhrit* maxim shows that though the word 'substitute' was first applied expressly to five descriptions of sons only, the word is applied to all the twelve descriptions by general use. Other digest writers also have often been driven to the necessity of forming constructive rules on some of the most essential points of the law of succession and inheritance, as the old law-givers had omitted to lay down any express rule on such points, as when the right of proprietorship vests in a son or sons in property belonging to the family. In the text, "After the (death of the) father

(a) K. L. Sarkar's *Mimansa Rules of Interpretation* p. 133.

and mother, the brethren being assembled, must divide equally the paternal estate: for they have no power over it, while their parents live," Manu's assertion about the proprietary right of the father during his life-time, is an indirect proposition. Its literal construction will not determine the question, specially in face of the texts of Yajnavalkya and other similar texts to the effect that neither the father nor the grandfather is master of the whole immovable estate. But these texts are also not clear on the point. So Vijnaneswara and Jimutavahana had recourse to various rules of construction to determine these points and this process involves what Jaimini called *Linga*, *Vakya* and *Prakarana*, though each process led to different conclusions.

There is no direct proposition as to the eternity of the Vedas themselves, but by the *Linga* principle of construction it has been so held by Jaimini. There is the following text in *Rik Samhita* V. 76. 5: "Oh Virupa by speech which is eternal!" Jaimini [Sutra 23. Ch. I. Bk. i] establishes principle for the eternity of the Vedas by the *Linga* principle, for the eternity of speech being assumed in the above text, a proposition asserting it can positively be construed.

III. THE VAKYA PRINCIPLE

Vakya is the process by which syntactical connection between one word and another, and between one clause and another is fully determined where such connection is not clear on the face of it. It is not used in its usual sense of a proposition or sentence.

Jaimini [III, iii, 44] defines *Vakya* thus: "The unity of idea constitutes the unity of a *Vakya*; if it be divided, then one part becomes as if pressing for another." अयैकत्वादेकं वाक्यं साकाङ्क्षं चेद्विभागेऽस्यात् । He explains that *Vakyas* become different, when one co-ordinate proposition begins and another ends. "In the case of co-ordinates, there is division of a *Vakya* (proposition)." Laugakashi Bhashkara defines *Vakya* to be *Samavibyahara* समविध्याहारो वाक्यम् । (putting together) and says: "It means the connected enunciation of two words denoting two things which, in reality, stand to each other in the relation of principal and subsidiary, although this is not indicated by second case affixes, *etc.*, directly indicating the one of the two things to be the thing to be accomplished by the other *etc.*, (which relations are directly indicated by *Vibhakti-sruti etc.*)"

समविध्याहारश्च साध्यत्वादिवाचकद्वितीयाद्यभावेऽपि वस्तुतः शेषशेषि वाचकपदयोः सहोच्चारणम् ।

The passage though a bit obscure, shows that the real gist of the *Vakya* principle is to find out a grammatical relation which is not clear

on the face of it. But where the grammatical relation between sentences is explicit and the meaning of the words clear, it would be called literal construction.

In the Adhikarana called *Sandigdharthani upanadhikarayanam सन्दिग्धार्थनिरूपणाधिकरणम्* Jaimini [I. iv. 18. Adhi] lays down, "In cases of doubt, the solution is by reading into the passage what forms the sequence of it." सन्दिग्धेषु वाक्यशेषात् [I. iv. 29]. There is the text, "He places besmeared pebbles of sandstone." शर्करा अक्ता उपदध्यात् Then follow the words, "*Ghee* is indeed light." तेजो घृतं [Taittiriya Samhita 3, 12, 5, 12].

In the above passage one does not know what is the meaning of besmeared pebbles. With what are the pebbles to be besmeared? This difficulty is removed by the succeeding clause which speaks of *Ghee*. So it must be understood that the pebbles are besmeared with *Ghee*. Here you will observe that in order to make the meaning of the passage clear, it is not only necessary to utilise the term *Ghruta* in connection with the term *akta* अक्ता (besmeared or anointed), but also to supply the word *ghritena* (by ghee) घृतेन before the word *akta* अक्ता. It often happens that the Vakya principle involves the introduction of some variation in the structure of the sentence. The following will serve as an illustration of the point. "He, whose sacrificial ladle is made of *Parna* wood hears no evil sound" यस्य पर्यामयी जुहुर्भवति न स पापं श्लोकं शृणोति । Laughakeshi Bhaskara makes the Vakya principle bear upon this text in the following manner (Dr. Thibaut's translation) :

"The passage 'he whose sacrificial ladle is made of *parna* wood hears no evil sound.' Here we see from the manner in which the words *parna* wood and ladle are joined, that the ladle should be made of *parna* wood. Nor is it to be said that the circumstance of being made of *parna* wood is purposeless as the ladle could be made also in a different way (*i. e.*, from some other kind of wood). For the word ladle intimates at the same time the peculiar transcendental result to be accomplished by it (by a ladle made of *parna* wood). So that the sense of the passage is "By its being made of *parna* wood he is to realize the peculiar transcendental result connected with the ladle, by means of carrying in it the oblation, after it has been taken out of the vessel (by *avadana*). As it thus appears that if the ladle is made of *parna* wood, then the transcendental result to be brought about by it ensues and not in any other case, the circumstance of its consisting of *parna* wood is not purposeless. The phrase "by means of carrying in it the oblation after it has been taken out of the vessel by *avadana*" (*i. e.*, the

last phrase of this clause) is necessarily to be used as otherwise the quality of being made of *parna* wood might be extended to *Sruva*, *Sruk* etc. also. . . .”

यथा यस्य पर्णमयी जुहुर्भवति न स पापं श्लोकं शृणोतीत्यत्र पर्णताजुहोः समभिव्याहारादेव पर्णताया जुहृक्त्वम् । न चानर्थवयम्, अन्यथापि जुहोः सिद्धत्वादिति वाच्यम् । जुहु शब्देन तत् साध्यापूर्वतन्नात् । तथा च वाक्यार्थः । पर्णतयाऽवत्त इ विधारेणद्वारा जुहृपूर्वं भावयौदिति । एवं च पर्णतया यदि जुहु. क्रियते तदेव तत्साध्यमपूर्वं भवति नान्यथेति गम्यत इति न पर्णतन्तुया वैयर्थ्याम् । अवत्त इवि धारेणद्वारेति चावश्यं वक्तव्यम् । अन्यथा सुवादिष्वपि पर्णतापत्तेः । Laugakshi Bhasikara, p. 7.

In short, Laugakshi Bhasikara says, though somewhat obscurely, that the clause “he whose ladle is made of *parna* wood hears no evil sound” should not be read as it stands, but that it should be read as if certain other words which occur later on formed part and parcel of it.

The application of the Vakya principle gives the text quite a different reading from the original text and the variation becomes unavoidable to make it useful. Thus the proposed reading makes it an applicatory Vidhi with the proper sanction attached to it. The change is brought about to give effect to the axiom of avoiding meaninglessness to a text.

Aruni maxim well illustrates this principle of construction. That text is, *Arunaya pingakshaikahayanya somam kṛināti* [Taittiriya Samhita 6. 1. 6. 7]

“Buy *Soma* by means of the red-coloured, pink-eyed and one year old.” Three adjectives are found in the above without a noun which they qualify. What is that thing which must be red coloured, pink-eyed and one year old with which the *soma* is to be bought? It is a calf. For in the description of *Soma Yagya* where the text occurs a mention of a calf has been made. So calf is to be put after the adjectives to make the sentence clear. Savara Bhashya (p. 310) admits this construction to be Vakya वाक्यम् अरुण्या क्रीणाति इति ।

Modern writers generally use Anvaya (syntactical connection) for

Vakya includes Adhyahara, Anusanga etc.

Vakya. In Anvaya small particles such as *cha* च which means that the words connected by it have to be taken as connected incidentally or collectively or severally or in a cumulative sense, are of great value. Vakya includes the use of Adhyahara and of Anusanga (the supplying of ellipses in some form or other), as well as of *Upakarsha* and *Apakarsha* (transference of clauses up and down). The supplying of ellipses of

connecting links between two sentences is of frequent occurrence in the process of the Vakya principle. The importation of words from outside is not proper where an ellipsis can be supplied by reading into the passage words that occur in the passage itself. This rule is also consistent with the Anusanga maxim which is to the effect that, "where there is a number of incomplete clauses followed by one which is completed by a finite verbal clause, this last should be read at the end of each of the other clauses to make them complete." [अनुसङ्ग न्यायः Jaimini II ii. 16. Adhi]

In the well known *fictum valet* controversy Jimutavahana resorts to Adhyahara (insertion and variation of words) and cites the following texts :—

"A single parcener may not without consent of the rest, make a sale or gift of the whole immovable estate nor of what is common to the family."

स्थावरस्य समस्तस्य गोत्रसाधारणस्य च ।

नैकः कुर्यात् क्रयं दानं परस्परमतं विना ॥

[Vyasa.]

"Separated kinsmen, as those who are unseparated are equal in respect of immovables: for one has not power over the whole to give, mortgage or sell it.

विभक्ता अविभक्ता वा सपिण्डाः स्थावरे समाः ।

एको ह्यनोशः सत्त्वात् दानाधमन विक्रये ।

[Vyasa.]

"Though immovables or bipeds have been acquired by a man himself, no gift or sale of them can be made unless conversing all the sons."

स्थावर द्विपदञ्चैव यद्यपि स्वयमर्जितं ।

असम्भूय सुतान् सत्त्वात् न दानं न च विक्रयः ॥

Out of these texts the last one is defective which says "no gift or sale of such and such property." So a verb should be supplied either conveying the sense of 'must be made' or 'should be made. Jimutavahana is in favour of the latter clause.

The Mimansakas do not clearly suggest a deviation of the ordinary grammatical rule, but point out the necessity of combining words and clauses in an order different from that in which they present themselves, so justifying an alteration of the actual syntactical connection. Maxwell [3rd Ed. pp. 26-27] also suggests the necessity of making in some cases a deviation from the ordinary grammatical rules as is evident from the following passage:

"But it is another elementary rule that a thing which is within the letter of a statute is not within the statute unless it be also within the

real intention of the Legislature, and the words, if sufficiently flexible, must be construed in the sense which, *if less correct grammatically is more in harmony with that intention.*"

IV. THE PRINCIPLE OF PRAKARANA

When a subject is divided into parts or topics which are again subdivided into subordinate parts and this subdivision is continued till sections or paragraphs are arrived at, such sections or paras are generally termed Prakaranas. But in legal phraseology 'the divine law as laid down in the Vedas' denotes the details of a transaction which has been enjoined or subordinate rules relating to the carrying out of its details. Accordingly Jaimini [in Sutra II, Ch. III, Bk. III] defines Prakarana thus: "(Where the principal Vidhi is) disjoint, the purpose of the details (*itikartavyata*) is settled from the Prakarana," असंयुक्तं प्रकरणादितिकर्तव्यतार्थत्वात् ॥ The principle has been explained by Laugakshi Bhashkara as "*Ubhayakanksha*" (interdependence) उभयाकाङ्क्षा प्रकरणम् and has been defined and illustrated as follows: "An example is afforded by the following passage connected with the *prayajas*, 'he is to offer the *samidh*.' As in this passage no special fruit (of the offering) is mentioned, the sense merely being 'he is to realize by means of offering the *samidh*,' there arises the question 'what (is he to realize)?' originating in the want of something to which the offering of the *samidh* might contribute. And again after the passage about the Darsapaurnamasa sacrifice it has given rise to the idea 'he is to realize paradise by means of the Darsapaurnamasa' there arises the question 'how is he to realize paradise?' originating in the want of something which may contribute towards bringing about the desired result. Thus by mutual interdependence the subsidiary relation in which the *prayajas* stand to the Darsapaurnamasa is established."

यथा प्रयाजादिषु समिधा यजतीत्यादौ वाक्ये फलविशेषस्यानिर्देशात् समिधागेन भावयेदिति बोधानन्तरं किमिति उपकार्याकाङ्क्षा । दशपूर्णमास वाक्येऽपि दशपूर्णमासाभ्यां स्वर्गं भावयेदिति बोधानन्तरं कथमित्युपकारकाकाङ्क्षा इत्थं चोभयाकाङ्क्षया प्रयाजादीनां दशपूर्णमासाङ्गत्वम् । (Laugakshi Bhashkara p. 8).

From the above example it is clear that the text 'he is to offer the *samidh*' is an incomplete proposition as it does not express in what connection the offering is to be made, or for what purpose. The same is the case with the text that one is to realize paradise by means of the Darsapaurnamasi. It simply declares the purpose and object of performing the Darsapaurnamasi, but it does not show what offerings are to be made in performing it.

The Sruti construction of the two passages cannot help us in any way and the Linga principle is also of no avail. For the first passage '*Samidha yajeta*' has in it no suggestive power to suggest anything specific to develop the sense of the other passage '*Swargakama Darsa-purnamasabhyam yajeta*' and *vice versa*. The Vakya principle is also not applicable to this case as there cannot be any grammatical construction between passages which are not close to each other. When these three principles of construction fail, a new principle has to be taken recourse to. This principle is in fact the principle of interpretation by the logic of the subject. It is based on the latent relation of ideas which, looking to the nature of subject, must have been present in the mind of the author. In this case there is no human author as our law is divine. This principle is therefore removed from the literal principle further than either of the preceding two *viz.*, Linga and Vakya.

There are some restrictions as regards the application of this principle of construction. Where a clause is regarded as Prakarana, it should not be placed *higher* than the Vidhi, so as to make it a Vidhi specially where such a Vidhi would be useless. Accordingly Jaimini has laid down in Sutra 24, Ch. II, Bk. I: "Where Prakarana is possible, something higher must not be supposed when it would bring into existence an useless Vidhi." प्रकरणे सम्भवन् अपकर्षो न कल्प्येत, विध्यानर्थक्यं हि तं प्रति ॥

This Sutra has been made to bear on a text of Taittiriya Samhita [1. 6. 3. 4] which is to the following effect: "If you leave such and such act unperformed, you will please the lowest spirits; if you half perform it, you will please the middle spirits; if you fully perform it, you will please the gods; the sacrificer who has left the work half done should do it thoroughly to please the gods." यो विदग्धः, स नै ऋतः । योऽशृतः सरौद्रः । यः शृतः सः सदेवस्तस्माद्विदहता शृतङ्कत्यः सदेवच्चाय ॥

"The question raised is this: The last clause which is the operative clause speaks of doing the thing thoroughly so as to please the gods. But there is no operative clause of doing it by half so as to please the middle spirits who like the doing of it by half. Should not such an operative clause be presumed? The author says 'no,' because the clause for doing the thing by half to please the middle spirits is capable of being read as a Prakarana to the last clause. Its meaning would be quite satisfied by taking it as merely an introductory clause. So a Vidhi should not be presumed for performing a similar act by half, specially as the whole passage bears on the Purnamasi Yagya, which has no Vidhi for any offering to the middle spirits." [K. L. Sarkar p. 151].

"In order to refer a passage which states a matter of detail or an incidental matter to some principal matter with which it may be connected, the interpreter must ascertain what the principal matter is. This he must do by a general study of the subject. Jaimini lays down in Sutra 1, Ch. I. Bk. VII :—

श्रुतिप्रमाणत्वच्छेषाणां मुख्यभेदं यथाधिकारं भावः स्यात् ॥ This principal sacrifice is Darsapaurnamasi and it is called the *Prakṛiti*. Subordinate sacrificial acts without any express purpose must be taken to be part of this principal sacrifice. The Darsapaurnamasi has no provisions as regards detail in its own place. So a want is created for the subordinate sacrificial acts which are stated elsewhere." [K. L. Sarkar p. 151].

Upalakshana (*incidental* indication) is another name for Prakarana.

Other equivalents. These terms are practically equivalent though not exactly the same. The term Upalakshana is used to indicate a case where particular instance is taken to represent a general rule. For example, Jimutavahana while dealing with the question of the succession of a son to his father, says that it is a case of Upalakshana only, meant to represent the general principle. When the general principle is mentioned at one place and the particular instances at another, they are no doubt illustrations of the general principle, but their fit place would have been where the general principle was stated. So Upalakshana, though not exactly similar to Prakarana resembles it. In *Gurugobinda Shaha v. Anand Lal Ghosh*, 13 W. R.—, regarding the question of succession of persons related as one's paternal uncle's son, Mitter, J., pointed out that the Dayabhaga abounds in passages in which a particular instance is put down to represent a general principle. A particular instance is so to say a part of a general principle, just as an isolated act of sacrifice is taken to be a part of the standard sacrifice.

A Prakarana forms a part and parcel of some one principal Vidhi or principal transaction. But a Guna Sruti is a general enunciation of some proposition, which is applicable to any Vidhi or transaction according to its requirements. In fact, it describes what are the characteristic features of a thing, without reference to any particular case [Jaimini III. i. 14] सर्वेषां वा लक्षणत्वादविशिष्टं हि लक्षणम् । In this respect Mitha Asambandha Nyaya (the principle of non-mutual connection) which is stated as follows may be considered :—"Descriptive clauses being directed to the main purpose are all co-ordinate and have therefore no connection with each other." [Jaimini III. ii. 22].

गुणानां च परार्थत्वादसम्बन्धः समत्वात् स्यात् ।

Along with these principles of construction two other principles are also mentioned which are particular cases of Prakarana and of Linga, also of a limited character.

Sthana principle.

देशसामान्यं स्थानं । 'Sthana' (position) means commonness of place. It signifies the relative position of one text with reference to another. Such relative position explains the order of sequence in which the texts must be taken to stand with reference to each other or in which the acts must follow each other. So 'Sthana' is practically similar to 'Krama' (the order of succession). Laugakshi Bhashkara holds that 'Sthana' has the same meaning as 'Krama' **स्थानक्रमश्चेत्यर्थान्तरम् ।**

The relation arising from position is often useful in settling the meaning and effect of texts which are thus related by position. The question of Krama (order) is of grave importance in Vedic ceremonies. The rules of Krama may also be turned to account in settling the relative position in some cases of heirs whose position is not determined by texts. For example, in the case of succession of the sons of daughters of agnate relations, when such an heir presents two oblations only to one of the ancestors, a difficulty has been felt whether he is to be placed after or before an agnate relation who offers only one oblation to such ancestor. In such cases, the considerations which Jaimini introduces in the rules of Krama laid down in Book V of his work, may be of considerable help. But a resort to these rules has never been tried in such a case [K. L. Sarkar p. 154].

Another principle is Samakhya (name) which is an inferior kind of Prakarana. It means and signifies a connection established between different passages by the indication given by a derivative word or a compound name. For instance the word *Dayada* (person on whom heritage devolves) occurring in a text would connect that text with the subject of *Daya* (partition).

Samakhya principle.

SECTION 3. THEIR RELATIVE FORCE AS TO APPLICATION

It is essential to consider the relative force of these four principles of construction. Before doing that the following passage of Maxwell may be perused with advantage : "The literal construction then, has, in general, but *prima facie* preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act; to consider, according to Lord Coke, (1) what was the law before the Act was passed, (2) what was the mischief or defect for which the law had not provided, (3) what remedy Parliament has appointed, and (4) the reason of the remedy.

According to another authority, the true meaning is to be found not merely from the words of the Act, but from the cause and necessity of its being made, which are to be ascertained not only from a comparison of its several parts, but also from extraneous circumstances. The true meaning of any passage, it is said, is to be found out not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and the object appearing from those circumstances, which the Legislature had in view."

There is a suggestion of a variety of rules and principles covered by the general expression 'construction by context' in the above passage, but no attempt has been made to separate the province of literal construction from that of a contextual one. But in our Mimansa system, literal or Sruti principle of construction has been clearly set apart from other principles of construction, such as, Linga, Vakya and Prakarana, and Sruti has an admitted superiority and preference over the others. The rules of interpretation have been reduced to a scientific form, a proper classification has been made, which far excels any other system of interpretation.

Sruti principle of construction stands obviously distinguished from Linga, Vakya, and Prakarana. Prakarana is also clearly distinguishable from the rest, but the difference between Linga and Vakya which are both principles of construction by context, is not so clear and obvious. K. L. Sarkar (p. 157) has very nicely explained the distinction in these words: "But according to the Mimansakas, the term Linga is applicable only to cases in which the context clears up the obscurity and vagueness of the meaning of words and of clauses. And the term Vakya is applied where the context removes the obscurity and vagueness of the connection between one word and another, or between one clause and another. In Linga the limits of a proposition are illustrated or illumined by extrinsic light; in Vakya the limits are enlarged or contracted by additions or subtractions. Thus, although both Linga and Vakya are cases of interpretation by context, they are distinguishable from each other. Linga is said to be the suggestive power of words and clauses. It may be said that Vakya also in one sense involves the suggestive power of words and clauses. But there is this difference between the two, according to the Mimansakas. They take care to point out that the Linga is the suggestive power of words and clauses to show the meaning and intention of any particular word or clause. Kumarila Bhatta elaborately explains this. In cases of Vakya, no doubt the suggestive power of

words and clauses comes into play, but it is not to show the meaning of any particular word or clause, but to indicate how one word or one clause is to be read with another word or another clause."

"The above distinction is not fanciful, nor useless. For there are cases in which it is only necessary to consider the meaning and intention of any particular word or clause. And there are others in which there is no necessity to consider the question of the meaning of any word or clause, but in which the only necessity is to consider how a particular word or a particular clause should be read with some other clause as a matter of syntax. So it is proper that the interpreter should not make confusion between the two cases."

"The Mimamsa writers do not lose sight of the fact that practically both the Linga and Vakya principles, and for the matter of that also the Prakarana principle, are often applied together as supplementary to each other in interpreting one and the same passage. In such a case the different principles co-operate towards the same end, and there is no conflict between them. Consequently in such a case the question of their relative force or relative value does not arise. When, however, there is a combination of the operation of two or more principles, as stated above, the Mimamsa writers designate the case as belonging to that principle of construction which has the predominating part, ignoring those that play a subordinate part."

विध्युक्तिविनियोगा हि न विना शब्दशक्तिभिः । न चेन्द्रशब्दसामर्थ्यमभिधा-
श्रुतिवर्जितम् ॥ सत्यमुभयत्रोभयमप्यस्ति । किन्त्वैन्द्रा गार्हपत्यस्य
नोक्तिशक्त्यावगम्यते । इन्द्राकृत्वमतिश्चास्या नाक्षरश्रुतिकारिता [Tantra Vartika
p. 839.]

वाक्यं ह्येतत् ऐन्द्रा गार्हपत्यमुपतिष्ठते । नैतदेवम् यदप्येतत् वाक्यं
श्रुतिरप्यत्रास्ति । या त्वत्र श्रुतिः सालिङ्गेन विरुध्यते न यत् वाक्यम् ।

[Savara Bhashya p. 314]

Sruti is clearly distinguishable from Linga and Vakya, as in a
Sruti distinguished from other principles. Sruti there is no ambiguity of meaning nor any vagueness of connection raising doubts as to which word should be read with which word. Sruti is, as has already been observed, a literal principle of construction and is independent, so it is easily distinguishable from Prakarana which is dependent. The difference between a Vakya and a Prakarana is that in a Vakya words or phrases are to be read together as a matter of syntax, while in a Prakarana propositions are to be read together as a matter of the logic of the subject. When the interpretation of a subject-matter is made under the combined operation of all, the case goes by the name of that principle which plays the chief part. Some illustrations are given below :—

"In the Garhapatya maxim **गार्हपत्यन्यायः** [Jaimini III, ii, 2. Adhi] the leading part of the sentence Garhapatyam Upatishthate **गार्हपत्यम् उपतिष्ठते** | being Sruti *i.e.*, being unambiguous the whole sentence is taken as a Sruti, because by virtue of the leading words the whole sentence becomes clear in meaning. Here the Vakya principle comes in as a subordinate matter **यदप्येतत् वाक्यं श्रुतिरप्यत्रास्ति, या त्वत्र श्रुतिः सा लिङ्गेन विरुध्यते ।"**

"In the Barhi maxim **वर्हिःन्यायः** the meaning of the leading words 'Dami **दामि** and Barhi **वर्हिः** of the sentence being settled by Linga, the whole sentence is regarded as a case of Linga, although the Vakya principle has a subordinate part in it. In the Parna-wood maxim, the leading idea is not expressly mentioned, but it is implied by reading one clause with another by the principle of Vakya. But tacitly the principle of Prakarana joins in making the implication." [p 160.]

There may occur cases in which by applying different principles opposite results may ensue. In such cases one principle cannot be so applied as to override another [Savara Bhashya III, iii, 14] **वलीयानपि**

हेतुर्विरुध्यमाणम् अवलीयांसं वाधितुमर्हति नाविरुद्धम् । Jaimini [III, iii, 7] has clearly laid down the Adhikarana which is called "*Srutyadi nam purva purva Valiyatvadhikarana* " (the topic of the superior force of Sruti, Linga *etc.*, in the ascending scale). Sutra 14 of the said chapter of the same book runs thus: "Where Sruti, Linga, Vakya *etc.*, are applicable (but tending to different results), one is superior to the other in the order of the enumeration, because the significance of each that follows is remoter and more far-fetched."

श्रुतिलिङ्गिवाक्यप्रकरणस्थान समाख्यानां समवाये पारदोर्व्वर्त्यमर्थविप्रकर्षात् । It has already been explained from Garhapatya maxim that where Sruti and Linga principles are both applicable but with divergent tendencies, that of the Sruti prevails. Other cases of Linga and Vakya are discussed in this text: "I make a pleasant seat for thee, I make it very lovely with a stream of Ghee; on this, the immortal one sit down, repose on it, propitiously-minded, O marrow of the rice-grains."

K. L. Sarkar (p. 161) has explained the above text thus:

"Now this passage is not a combination of two co-ordinate Vakyas, the one containing the idea of making a seat, and the other the idea of an invitation to the rice-deity to sit on it. But it is one Vakya in which, of the two ideas, one must be the principal and the other ancillary. The question is which of the two ideas is the principal, the making of the seat or the request to the rice-deity to sit on it. If you read it simply as a Vakya, then the leading idea would seem to be

asking the divinity (the marrow of the rice-grains) to sit down on the pleasant seat, which the devotee is preparing and making lovely for him. To give effect to this idea, the second clause should be placed first, as it contains the leading idea, thus giving the first a subordinate position, which according to the grammatical connection apparently it deserves. This is the effect of construing the passage by the Vakya principle. *Now apply the Linga principle to it.* When the Rishi says, 'I make a pleasant seat for thee, O divinity in the marrow of the rice-grains,' it implies by the suggestive force of the words that such a pleasant seat should be made. In other words, it implies a Vidhi for making such a pleasant seat. This suggestive power of the words is strengthened by parallel cases, such as, "*Barhi Devasadanam Dami.*" वहिदेवसदनं दामि । Thus by applying the Linga principle, the first half of the sentence becomes the leading element of the whole sentence and becomes an applicatory Vidhi, subsidiary to the Darsapaurnamasi Yaga. The two results being different, which is to prevail? The answer is,—Linga. "For, if you accept the Vakya principle, you must also apply the Linga principle to make an applicatory Vidhi out of the passage, so as to convert the second clause to an applicatory Vidhi to the effect that the rice-deity must be asked to sit down. But by the direct application of the Linga principle we have an applicatory Vidhi without transposing the parts. Therefore, we should not resort to the Vakya principle in this case."

The principle as to the superiority of Vakya over Prakarana can be illustrated by means of the text: "O Indragñi! **Superiority of Vakya over Prakarana.** You accepted this offering etc." इन्द्राग्नि इदं

हविरित्यादि [Laugakshi Bhashkara] in the words of K. L. Sarkar (p. 163): "This text is collateral to the text relating to the Darsa sacrifice and should be read together as forming one Vakya. But it forms a Suktavaka, and, as such, can be connected by Prakarana with the Darsapaurnamasi sacrifice. In other words, by Prakarana, this Suktavaka is to be used both at the Darsa sacrifice as well as at the Paurnamasi sacrifice. But reading Suktavaka as a text collateral to the Mantra and addressed to Indragñi, who is only invoked at the Darsa sacrifice, the Suktavaka should be used only at the Darsa sacrifice. In other words, by the Vakya principle, the Suktavaka would relate only to the Darsa sacrifice, the divinity Indragñi not being found in the Vidhis regarding the Paurnamasi sacrifice. Thus the two principles would tend to different results. According to the Adhikarana, the Vakya principle should prevail and the Suktavaka should be only used at the Darsa sacrifice and should not be taken as a Prakarana to the Darsa paurnamasi sacrifice. The reason assigned by the Mimansakas

with reference to this case is rather technical. But to common sense, the reason is simple. The construction by Vakya is comparatively nearer to the literal construction than construction with reference to presumptions made on the basis of logical considerations."

The effect of the maxim regarding the relative force of Sruti, Linga, Vakya and Prakarana in the order mentioned may be summarised thus in the words of K. L. Sarkar (p. 164) "When both the substance and form of an expression is clear (Sruti-like), it requires no construction. Failing that, the construction should be rather with reference to the substance (Linga) of the expression than its form (Vakya). And as a Vakya represents an integral idea, an expression should be presumed rather to be a Vakya than a Prakarana, which means a fragmentary idea."

The Adhikarana regarding the relative superiority of these principles of interpretation would be more clear if illustrations be taken from our recent digest writers :—

ऊर्ध्वं पितुश्च मातुश्च समेत्य द्वातरः समम् ।

मजेरन् पैतृकं रिक्थमनोशास्ते हि जीवतोः ॥ [Manu IX, 104].

"After the (death of the) father and the mother the brethren being assembled must divide equally the paternal estate; for they have not power over it, while their parents live."

Jimutavahana interprets this text on similar lines as Jaimini did with regard to "Aindra Garhapatyam Upateshthate", a text of the Sruti principle. *Garhapatya Upatishthate* being the gist of the whole text and being clear or expressive of itself, the word 'Aindra' with its suggestive power (Linga) is not allowed to interfere with the clear meaning of the word *Garhapatya*. Similarly Jimutavahana takes the expression 'Anishaste hi jibato' अनीशास्ते हि जीवतोः as the essence of the text, and says that when the meaning of these words is clear, showing that the sons have no right during the life-time of their parents, the first part of the sentence, which might suggest the idea of laying down a rule as regards the time of partitioning property, which had vested in the son before the death of the father, cannot be taken in this sense so as to override the clear meaning of the essential words 'Anishaste etc.' Colebrooke translates the statement on this point in para 29 Ch. I as follows: "Therefore the text of Manu must be argued (by you) to intend the prohibiting of partition, although the son's right subsists during the life of the father. But that is not maintainable. For it would thus bear an import not its own." अतो जीवति पितरि सत्यपि पुत्राणां स्वाम्ये निषेधार्थं मनुवचनं वाच्यं तच्चाग्न्योन्य स्वार्थपरतापत्तेः । In fact, the first clause, at best, can only suggest

that the right vested before the death of the father by way of Linga. But as the concluding portion clearly shows that the right had not so vested it should prevail in the way of Sruti. [K. L. Sarkar p. 165]

Jimutavahana's discussion on the following text of Yajnavalkya will further illustrate the superiority of Linga to Vakya ;—

अप्रजास्त्रीधनं भर्तृव्राह्मादिषु चतुर्विपि ।

“ The separate property of a childless woman married in the form denominated Brahma or in any of the four (unblamed form of marriage) goes to her husband.”

This text is not clear, but if the suggestive power of the corresponding text of Manu be utilized, it would be evident that the property which has been received by a woman at the time of her marriage in any of those forms, devolves on her husband, if she die without issue.

The text of Manu IX, 196 and 197 are given as under :

It is admitted, that the property of a woman married by the ceremonies called Brahma, Daiva, Arsha, Gandharva and Prajapatya shall go to her husband if she die without issue. But her wealth, given to her on her marriage in the form called Asura or either of the other two forms (Rakshasa and Paisacha) is ordained on her death without issue, to become the property of her mother and of her father.”

ब्राह्मदैवार्शगान्धर्वप्रजापत्येषु यद्धनं ।

अप्रजायामतीतायां भर्तुरेव तद्विष्यते ॥

यस्वस्याः स्याद्धनं दत्तं विवाहेष्वासुरादिषु ।

अतीतायामप्रजायां मातापित्रोस्तद्विष्यते ॥

The expression, “But her wealth given to her on her marriage etc.,” of the above passage as given by Jimutavahana shows that the meaning of the first part of Manu's text as well as of Yajnavalkya's is that the property given to her at the Brahma and allied forms of marriage is the subject of the rule enunciated.

If we look to the syntactical arrangement of Yajnavalkya's text, the meaning would be that any property belonging to a woman married according to the above forms would go to her husband. In connection with the above, Jimutavahana applied the Linga principle in preference to Vakya though reasons have not been given.

The principles of construction, as given above, are called Viniyoga Pramanas by Laugakshi Bhashtara. ‘Pramana’ means principles of construction. A number of Pramanas (means of proof) have been mentioned in the Hindu system of philosophy. They are:

(1) Pratyaksha प्रत्यक्ष —Direct perception,

- (2) Anumana अनुमान —Inference.
- (3) Upamana उपमान —Analogy.
- (4) Arthapatti अर्थापत्ति —Concomitancy of sense.
- (5) Shabda शब्द —Communication.
- (6) Shishtachara शिष्टाचार —Approved usage.
- (7) Abhaba अभव —Something like *reductio ad absurdum* method.

These Pramanas have little connection with the subject of construction except that Shabda Pramana is the basis of the Sruti principle, and that Anumana, Upamana and Arthapatti together are the basis of Linga, Vakya and Prakarana principles, while Shishtachara is the foundation of those principles of interpretation which have reference to usage and which are discussed by Jaimini in his chapter on the Smritis.

CHAPTER IV

MAXIMS OF INTERPRETATION

SECTION I. INTRODUCTION

The specific principles of Mimamsa are termed Nyayas or maxims. Mimamsa Nyaya or Adhikarana, which Colebrooke has translated as Maxim, is a specific rule or a settled point on some subject or the other. It may be said to correspond to the head-note of a decided case as found in modern Law Reports. There is no doubt that a Nyaya is arrived at in a manner quite different from the process by which statements of points decided by the judiciary in a law-suit are arrived at. A maxim of Roman Law is a judicial principle by judicial savants, but Nyayas are decided by a process of arguments pro and con, and form the conclusion thereof. In this respect they may be said to resemble the head-notes of modern case-law.

Professor Maxmuller has given the analysis of a Nyaya in these words: "In order to discuss a subject more fully and to arrive in the end at a definite point, the authors of the Sutras are encouraged to begin with stating first every possible objection that can reasonably be urged against what is their own opinion. As long as the objections are not perfectly absurd, they have a right to be stated and this is called the *Purvapaksha*, the first part. Then follow answers to all these objections and this is called the *Uttarapaksha*, the latter part; and then only are we led on to the final conclusion (the *Siddhanta*). This system is exhaustive and has many advantages, but it has also the disadvantage, as far as the reader is concerned, that without a commentary he often feels doubtful where the cons and the pros begin. The commentators themselves differ sometimes on that point. Sometimes again, instead of three, a case of *Adhikarana* is stated in five sub-divisions, *viz.*,

1. The subject to be explained विषय ।
2. The doubt विशय or संशय ।
3. The first side or *prima facie* view पूर्वपक्ष ।
4. The demonstrated conclusion सिद्धान्त or निर्णय ।
5. The connection (relevancy) संगति । "

The *Mimansa Sūtras* are grouped into *Adhyāyas*, the *Adhyāyas* into *Padas*, and the *Padas* into *Adhikāranas* or sections. A *Mimansa Adhikarana* consists of five sub-divisions as given above

विषयो विशयश्चैव पूर्वपक्षस्तथोत्तरम् ।

निर्णयश्चेति पञ्चाङ्गं शास्त्रेऽधिकरणं स्मृतम् ॥

It has already been explained that the general principles of interpretation of *Mimansa*—*Sruti*, *Linga*, *Vakya* and *Prakarana*, are similar to the modern general principle of interpretation called the literal principle, the principle of interpretation by context and the like. The *Mimansa Nyayas* which are particular cases of the principles of *Sruti*, *Linga*, *Vakya* etc., could correspond to decided cases falling under one or other of the above-mentioned general heads. Therefore, a thorough knowledge of the general principles is very essential for the examination or study of the *Nyayas*.

Kumarila Bhatta, the leader of the *Mimansa* Literature, has laid down the doctrine as regards the two general principles, *Sruti* and *Linga*, that the *leading word or phrase in a text is to be found in the first instance*; the same principle has also been enforced by Savara Bhashya (Jibananda's Ed. p. 315) :

अथ वा नात्रैकवाक्यत्वात् इन्द्रप्राधान्यं गार्हपत्यप्राधान्यं वा उपस्थानस्य कुतस्तर्हि । इन्द्रशब्दत्वात् मन्त्रस्य इन्द्रप्राधान्यम् द्वितीयाविभक्तिश्रवणात् गार्हपत्यप्राधान्यम् तस्मात् श्रुतिलिङ्गयोर्विरोधः ।

If that word or phrase is clear in meaning, then the text is a *Sruti* and the pith of the subject-matter being clear, the rest of it will be clear by itself. For example, the words '*Garhapatyam Upatishthate*' which are the burden of the text '*Aindrya*' *Garhapatyam Upatishthate* ऐन्द्र्या गार्हपत्यम् उपतिष्ठते being clear, the whole text becomes clear. But when the leading word or words of a text are not clear, as the word *Dami* in the text *Barhi Devasadanam Dami वहिदेवसदनं दामि*, the ambiguity or uncertainty is to be removed by indications afforded by other words, either in the text itself or in other texts by the principle of *Linga*.

The next question of utmost importance that arises is, what are the "leading words"? Kishori Lal Sarkar in his treatise on the subject (p. 270) says: "Ganga Bhatta in his well-known work '*Bhatta Tarka-Pada*,' and Khanda Deva in his equally valuable work '*Bhatta Rahasya*,' explain how in some instances the word or words expressive of the tense and mood are the leading words, and in other instances the words denoting the case are the leading words. For instance, when

time or the manner of an action is the essence of a proposition, the words expressing the tense and mood are important. But when the essential point is, 'what is the object of an action', the accusative case is the leading thing; and when the essential point is 'by whom an action is to be done,' the instrumental case becomes prominent and so on. Thus the *whole key of Mimamsa interpretation is, to find out the leading word or words of a text as distinguished from subordinate words*. If the meaning of such word or words is clear, it is a Sruti enjoining an action or defining a thing. If the leading words are traceable, but their meanings are uncertain, you have to find out the precise meaning."

Nyayas may be classified according to the general principle and also with reference to the nature of the purpose they serve. According to the latter classification they may be divided into five kinds. Their classification and treatment as given by the learned author, Kishori Lal Sarkar, in his leading treatise, have been adopted in this work.

- I Those that relate to the interpretation of words,
- II. Those bearing on the construction of sentences and texts,
- III. Those bearing on the interpretation of prohibitory and apparently conflicting texts.
- IV. The popular maxims.
- V. Those of a miscellaneous character.

SECTION 2. MAXIMS RELATING TO THE INTERPRETATION OF WORDS

The maxims relating to the interpretation of words proceed from various points of view. Some of them supply special rules according as the word is an adjective or a substantive or a verb. Some of them are based on considerations as to whether the word is to be taken in its usual popular sense or in its etymological sense. And if it is to be accepted in a popular sense, whether that popular sense is to be the primary or the secondary phase of it. Again, if it is to be taken in a secondary sense, whether that secondary sense is a technical one, according to the peculiar nature of the subject-matter, or in a figurative or metaphorical sense.

Class I. Maxims relating to the interpretation of words may be sub-divided into the following groups:

Group A. Maxims of the nature of the Sruti principle as regards the interpretation of words, as for instance, those laying down that words are to be taken in their usually accepted or popular sense.

Group B. Maxims partaking of the character of Linga principle showing either those cases in which a word is used more or less in a

technical or special sense indicated by the scope of the subject or cases in which the usual sense of the word is contracted, extended or varied by the context, or where a figurative sense is indicated.

Group C. Maxims allied to the principle of Vakya, laying down presumptions with regard to the number and gender of words.

Class I. Group A

1. *The sense as understood by current usage is to prevail:*

पदार्थप्रावल्याधिकरणम् ।

For instance, we have to ascertain the meaning of *achemana* of the Smṛiti text: "By *achemana* proceed to begin the ceremony." In the Vedas the ceremony is to begin not by *achemana* but by establishing the Vēdi. So the question arises as to whether the meaning of this word in the Veda is different from its current meaning. This maxim enjoins that the current meaning would prevail, and also as to the different modes of practising *achemana* the current usage is to prevail and not the old Vedic use.

2. *The popular meaning overpowers the etymological:*
रुद्धिर्योगमपहरति ।

The word '*pankaju*' (marsh grown) would illustrate this Nyaya. Its etymological meaning is any thing that grows in the marsh. But the popular meaning of the word is 'lily', which is only one out of many plants growing in the marsh. Thus the latter meaning of the word prevails.

3. *The Sruti sense is not to be avoided:* **निरपेक्षो रवः श्रुतिः**

The word 'Keshava' in the text: "True way of worshipping Vishnu is to worship Keshava;" whether this is to be understood in its literal sense or as indicating any form of Vishnu? The decision is, 'the usual sense which strikes one at the pronunciation of the word is its meaning.' 'If the word Keshava had not been expressly mentioned,' adds Udichya Bhattacharya, 'then there would have been room for finding out the proper name by the Linga principle.' [Adhikarana Kaumudi, para 80].

अथ श्रुत शब्दात्यागः । यथा तद्विष्णोरिति केशवं यजते इति अत्र केशव वाचकनाम्नां बहुनां सत्त्वात् केन नाम्ना उल्लेख इति तत्र सिद्धान्तः यथा श्रुतवीहारेण वक्तव्यमिति वीहारो व्यवहारः तथा च उत्पत्तिवाक्यस्य वलवत्त्वात् केशव तुल्याख्यं न तु मन्त्रस्थं विधिवति यत्र विधौ नाम नास्ति तत्र लिङ्गस्थं ग्राह्यं ।

4. *Foreign words are to be taken in the sense which they bear in*

Foreign words in their foreign sense. *the foreign language, provided such sense can be rendered into Sanskrit: [Jaimini I. iii. 6.]*

स्लेच्छप्रसिद्धपदार्थप्रामाण्याधिकरणम्

For example, the foreign word *tamarasa* which means lily flower should be taken in that sense, though such a sense of the word is not to be met with in the Nirukta (the Vedic vocabulary).

5. *When an ancient text such as of the Vedas and a modern text contain the same term, the term must have the same meaning:* **प्रयोगचोदना भावादर्थैकत्वमविभागात्।**
[Jaimini I. iii. 30].

Same term in modern and ancient texts.

Class I. Group B

6. *The wooden-sword maxim: स्फादिन्यायः*

Jaimini's text **संयोगानुसारेण व्यवस्थितत्वाधिकरणम्** 'The sword, the potsherd, the sacrificial vessel called the Agnihotra Havami etc., these ten are sacrificial weapons' is to be considered in connection with this maxim.

Wooden-sword maxim.

The first word of the text *Spha* स्फा (sword) gives this maxim the name. The objector says that these words in the above text should be taken in their generally accepted popular sense, and should be indiscriminately applied according to that sense. The answer is in the negative. Each term is to be applied according to a particular requirement of the Yaga so as to suit it. Jaimini (III. i 11) has laid down "What is prescribed as a means to an action, is to be taken in a sense suited to the performance of the action." **द्रव्यं चोत्पत्तिसंयोगात् तदर्थमेव चोद्यते।** For instance, potsherd (*Kapala*) in connection with a *Yajna* means a baking earthen vessel. It is not necessary that the vessel should have that particular shape which the word usually denotes. Sword (*Spha*) in connection with a *Yajna* means a pushing instrument and not a cutting instrument, for a *Yajna* requires no cutting instrument. The main object in the subject of the text is the performance of the *Yajna* and the mention of these ten weapons is a subordinate matter. Therefore, the words describing these weapons must be understood in relation to the scope of the subject-matter.

7. *The Aruni maxim or the red-coloured maxim: अरुणन्यायः*

It relates to the following text from the first word of which it has taken its name. "With a red-coloured, yellow-eyed, one year old cow *Soma* is to be bought.' **अरुण्या पिक्वलाक्ष्यकहायन्यासोमं क्रीणाति इति।**
[Jaimini III. i. 12.]. The objector would say that in order to discharge

Aruni or the red-coloured maxim.

the duty of buying *Soma*, you must not only make the purchase with a cow which is yellow-eyed and one year old, but some how or other you must give effect to the word 'red-coloured.' The question that arises is whether red-coloured is something else than the intended quality of the cow? The reply is that the adjective does not relate to anything else than the identical cow which is yellow-eyed and one year old. The commentators mainly direct their attention to this question. 'When a thing is presented to serve the purpose of an action and there are more than one adjectives used in the text relating to the action, all the adjectives must be taken to refer to the particular thing and not to separate things to be implied.' The text of Taittiriya Samhita 6. 1. 6-7, "He is to buy *Soma* with red-coloured, an year old and yellowish-eyed animal." अरुण्या एकहायस्या पिङ्गलाद्या सोमं क्रीणाति । well illustrates this maxim, The adjective *red-coloured* must be taken to refer to the animal as well as the other two adjectives and not to something else to be implied, as for instance, cloth. Or in other words, the sentence is not to be read, as if it were, he is to buy *Soma* with red cloth and with an year old and yellowish-eyed animal. It would militate against the axiom of Laghava (simplicity). It has been well observed by K. L. Sarkar [p. 274] that this maxim further teaches that the qualifications that the animal with which the *Soma* is to be bought should be red-coloured *etc.*, are not to be taken as conditions precedent to buying the *Soma*, but as mere descriptions of the animal with which it is to be bought, to secure that it should possess a reasonable purchasing power.

The maxims making the distinction between adjectives, substantives and verbs are peculiar to the Mimamsa system of interpretation. The wooden-sword maxim and the Aruni maxim relate to the distinction between adjectives, substantives and verbs. The substance of the wooden-sword maxim is, that where a word represents a thing which is to be used in connection with the action enjoined by an operative verb, the sense of the word representing the thing should be so taken as to suit the action enjoined. If it has several connotations, the word should be taken connoting that quality only which is required by the exigencies of the action. The word 'Bench' well illustrates this maxim. It means a bench for the Judge to sit on and from this sense it now means a court, so its meaning is not confined to the peculiar form of the seat called bench. This maxim is inculcated by Sutra 11, Chap. I, Book III: "Material things being associated with an originating (action) are (to be taken as) prescribed to suit the purpose of that originating action.' द्रव्यं चोत्पत्तिसंयोगात् तदर्थमेव चोद्ध्येत । This means that the words which obviously purport to be subordinate to

the principal word enjoining duty, are to be interpreted according to the sense of the principal word.

Maxwell has also accepted the same principle in the opening Chapter II of his Book. He remarks, "The words of a statute are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and, the object to be attained. It is not because the words of a statute, or the words of any document, read in one sense will cover the case, that is the right sense. Grammatically they may cover it; but whenever a statute or document is to be construed, it must be construed not according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used."

As regards the wooden-sword maxim the principal thing in the subject of the text is the performance of the Yagya, the mention of the ten weapons being a subordinate matter; so the words describing these weapons must be understood in relation to the subject-matter. Having dealt with the interpretation of subordinate words which signify objects or things, Jaimini goes on to discuss the question of interpretation of subordinate words which express qualities of things *i. e.*, which are adjectives. The maxim is: "Qualifying words attached to the names of things which are means to an action are simply descriptions of those things, and do not operate as conditions precedent to the action itself." The Sutra literally translated runs as follows: Inasmuch as they have the same purpose, things and qualities thereof contribute to one and the same action as a matter of Niyama (arrangement)." Its significance is clear that nouns are subordinate to the verbs which are the operative part of a text. Adjectives prefixed to such nouns cannot be separated from the nouns, so as to give them an independent character as constituting an essential condition for the performance of the duty. Incidental references of objects and persons together with the qualities that they should possess in connection with a duty would not give these qualities the force of a Vidhi, forming an indispensable condition. In that case it will be impossible to perform any duty. The following text of Manu (III. 10) with regard to the duty of marrying illustrates this point: "The bride should among other things have a name which is easily pronounceable, should have a gaiety look like that of a swan, whose hair is gently flowing."

अव्यक्ताङ्गी सौम्यनाङ्गी हंसवारण गामिनी ।

तनुलोमकेयदर्शनां मृदाङ्गीमुदहेत किर्य ॥

The marriage in many cases would be impossible if these adjectives be taken as essential parts of the Vidhi for marrying. So the adjectives must be taken as mere matters of description that may be desirable but not as conditions precedent affecting the question of the validity of the marriage itself.

The red-coloured maxim is on a par with that relating to marriage quoted above and signifies that the use of the adjectives is a mere Niyama and does not affect the validity of the duty enjoined. Kumarila Bhatta also holds that the expression 'red-coloured' has not the force of a Vidhi. The term *Artha* (meaning) according to the Mimamsa system implies the signification of a word which it possesses by itself and is not derived from the power of other words—*Ananyalabhya-shabdārtha* अनन्यलभ्यशब्दार्थः । Apadeva refers the text from Mimamsanyaya Prakasika (p. 17) स एव हि शब्दस्यार्थो यः प्रकारान्तरेण न लभ्यते अनन्यलभ्य शब्दार्थ इति न्यायात् । The sense of the words made out from the context, that is, by the Linga principle, is not strictly speaking its *Artha* but its *Shakti* (latent power). The sense of a word derived from the context (Linga) is usually called *Lakshna Artha*. That is the sense which the Mimamsakas have clearly expressed. The '*Artha*' of a word as distinct from its power may be different, etymological, conventional, primary, secondary, technical, etc. When the etymological and popular meaning of a word is identical and is its only meaning, there can be no question as to its import, and the case becomes one of Sruti.

Words which are used in the Shastras ought to be taken in the sense attached to them by Shastric usage : शास्त्रप्रसिद्धपदार्थप्रावृत्याधि-

करणम् [Jaimini I. iii. 5].

In Vedas, in the text *Yava Mayascharu*, 'Yava' means another kind of corn of the same species called *priyangu* and this is its popular meaning ; but according to the Shastras it means *barley*. This word would, therefore, be used in the sense that is prescribed by the Shastras and not in any other.

9. The *Sarvasva-dakshina* maxim : सर्वस्वदक्षिणान्यायः

When the literal interpretation of a word would make another word

The use of a word in a qualified sense.

meaningless that interpretation should be taken in a qualified sense. In the text—"In the Vishvajit sacrifice the priests shall have '*sarvasva*' (the whole property) as presents ; in the Sarvajit sacrifice they are to have some trifling presents ; in the Sarvamedha sacrifice they are to have the whole property as well as some trifling presents," if the word *sarvasva* be interpreted literally, the expression 'they are to have the whole property,

as well as some trifling presents' would become meaningless. So the said word would be construed to mean land and valuables excluding earthen pots *etc.*

अथ सर्वस्वदाक्षिण्याधिकरणं । उद्गातृपूर्वान् विश्वजिति प्रतिस्तोतृ पूर्वान् सर्वजिदादिषु चतुर्दशसु सर्वमेधे तूमयमिति श्रुत्या विश्वजिति उद्गातृ प्रधानाः षोडशत्विजः सर्वजिदादौ प्रतिस्तोतृ प्रधानाः षोडशसर्वमेधेतु उद्गातृ प्रधानाः प्रतिस्तोतृ प्रधानाश्च ।

[Adhikarana Kaumudi para 4.]

10. *The Phalachamasa maxim* : फलचामस न्यायः

When the context indicates the technical sense of a word, it should be taken as such and not in its literal sense. The text—"Among the priests the remnants of the *homa* fruit cup (*Phalachamasa*) should be distributed for food"—illustrates this point. The expression 'fruit cup' is not food in its literal sense, but in a technical sense it means a cup full of barley, rice, oil and green beans together with a cocoanut; the word *phala* signifying cocoanut and the word *chamasa* denoting a cup containing eatables in general, such as barley, rice *etc.*

फलचमसाधिकरणं । प्रोद्गातृणां फलचमसं हुत शेषं भक्ष्यं ददातीति श्रूयते प्रोद्गातृणामिति बहुवचनात् प्रोद्गात्रादीनां ऋत्विजां सर्वेषामित्यर्थः यवव्रीहितिलैः मुद्गसाधितश्चमसः स्मृतः ।

[Adhikarana Kaumudi para 6.]

11. *Multiplicity of sense must not be attributed to the same word* :

The text—"The *Aditya* is the sacrificial post."—well illustrates this maxim. The word '*Aditya*' means a post as the Sun. If its meaning be taken as 'bright' in this text, then 'brightness being a quality of the Sun, it would be only a *shakti* or *samartha* (force) of the same sense. So to avoid the multiplicity of sense it should be taken as 'bright.'

[Adhikarana Kaumudi, para 50.]

अथ अनेकार्थत्वकल्पना । आदित्यो वै यूयो भवतीत्यत्र अदित्यपदेन आदित्यवर्ण उच्यते ।

12. *The Vyaktirachana maxim* : व्यक्तिरचना न्यायः

Where a general word occurs in connection with a particular proposition, the general word is to be understood to stand for an individual object proximately connected with the proposition.' Let the text—"Perform the *homa* (sacrifice) by the mantra called *Agneyi*"—be considered in this connection. The question arises as to what is the meaning of the mantras called *Agneyi*. The sense is that *Agneyi* mantra is to be used which is found in the proximity of the text referred

to but not any other mantra.

अथ व्यक्तिरचनान्यायः । आग्नेय्या जुहोतीति भ्रूयते.....सर्व्वैव ग्राह्या इति न सम्भवति.....सिद्धान्तः व्यक्तिरचनानां सन्निहित विशेष परत्वात्..... पाचकादि शब्दाः पाचकशब्दः पाक कर्तृत्वमात्रे प्रयुज्यते.....न तत्र प्रयोगः पक्वचाग्नेयी पदमपि व्यक्तिमात्रवाचकं.....सन्निहितैव ऋक्ग्राह्या । (Adhikarana Kaumudi para 47).

13. *The Vaiswadeva maxim* : वैश्वदेव न्यायः ।

“When two or more words have together acquired a symbolical meaning, they are to be taken in that symbolical meaning, and not in their natural meaning.”
Symbolical meaning preferred to natural meaning. वैश्वदेवादिशब्दानां नामधेयताधिकरणम् [Jaimini I. iv. 10].

14. *The Pranabhrit maxim* : प्राणभृत् न्यायः

“The peculiar feature of one leading object belonging to a class may give name to the whole class, ‘*Pranabhrit*’ literally means to inspire life; but the expression forms the commencement of a mantra which is used in consecrating certain bricks. Hence the word has come to mean a kind of brick प्राणभृदादिशब्दानां स्तुत्यर्थत्वमधिकरणम् [Jaimini I. iv. 17]. This is the way in which the word *Ajijyani* also has come to mean another class of bricks.” (p. 278).

Nanda Pandit in his treatise ‘*Dattaka Mimamsa*’ has made use of this maxim to establish that though the word ‘substitute’ was primarily applied only to six descriptions of sons, subsequently it was used in an extended secondary sense meaning all the twelve descriptions of sons.

15. *The Pillar Sacrificer maxim* : यजमानो यूपः

‘Where a word would be devoid of meaning except in a figurative sense, it should be taken in the figurative sense.’
Figurative sense. अथ यूपादिशब्दानां यजमान स्तुत्यर्थाधिकरणम् ।

16. *Where a word is left vague, its meaning should be made definite by reading it with what follows* : सन्दिग्धेषु वाक्यशेषात् । The text—“He places besmeared pebbles of sand. Ghee is indeed light.” शर्करा अक्ता उपदृश्यात् तेजो घृतम् । Taittiriya Brahmana (3, 1, 2, 6, 12)... illustrates this point. Here ‘besmeared with ghee’ is to be understood.

Class I. Group C

17. *The Grahaikattva (single cup) maxim or the maxim regarding general clauses* ग्रहेकत्व न्यायः

‘When a word is used in a text having the nature of a general

Singular number includes plural. clause (*Uddeshya Vakya*), the singular number includes the plural and the masculine gender includes the other two genders.' Although the word 'cup' is used in the singular number in the text 'He washes a cup,' it should be understood that all cups should be washed.

18. *The Pashvaikātva* (single animal) *maxim* or the maxim regarding the number and gender of words which enter into an obligatory text : पश्वैकत्व न्यायः

'A word occurring in an obligatory text (*Vidhi Vakya*) should be limited to the number, gender *etc*, which it grammatically bears in that text.'

For instance in the text—'By means of animals worship the Rudras' the opposite side contends that as the Rudras are many so there should be one animal offered for each Rudra. Jaimini decides, "No, in the absence of anything to the contrary the number should be that indicated by the inflection."

19. *The duality of Habis maxim* : हविरुभयत्व न्यायः

"Where the rule laid down in the one case is to govern another case, it is of no consequence that some of the facts of the case in which the rule is stated, are stated in the dual number, whereas the facts of the other case are in the singular number." For example: "The two *habis* (barley and rice) of which the *charu* is to consist are to be anointed by *ajya* (a particular kind of Ghee) in the primary *Putreshti Yagya*."

अथ हविरुभयत्वाधिकरणं पुत्रेष्टि यागे भृतिः ।

ब्रीहिसिर्यवैश्च प्राजापत्यं पृथक् भययेत् । [Adhikarana Kau-
mudi, para 8.]

'With regard to a secondary *Putreshti Yagya*, it is said that the *charu* is to consist of barley. The rule of anointing the *habi* with *ajya* in the primary *Yagya* is to apply to the secondary *Yagya*. The question is: Is the propriety of such an application affected by the fact that the *habi* in the one case consists of two things, whereas in the other of one thing only? The answer is—no, because the difference is with regard to an incidental matter.'

20. *The Kapijjala* (partridge) *maxim* : कपिजल न्यायः

In a clause providing for infliction of suffering on a creature, if the object of the infliction is expressed in the plural number, the number should be limited to the lowest numeral which would make a number. For instance, in Sanskrit when there is a plural number, not more than three should be taken. This maxim is quoted in the *Dattaka Chandrika*.

SECTION 3. MAXIMS BEARING ON THE CONSTRUCTION OF SENTENCES AND TEXTS

The principles of distinguishing between obligatory and non-obligatory or quasi-obligatory texts and the interpretation of the Smṛiti law and usage which are included in this class will be dealt with in detail in the next succeeding chapters in connection with the topic of the application of texts and the interpretation of the Smṛiti law and usage. The maxims relating to the negative Vidhis and cases of conflict of texts have been dealt with in Section 4. Leaving out these several groups of maxims, the division of the rest may be given in **class II** as under (x) :

Group A. Maxims of strict construction of texts and sentences ; that is, those which are mainly of the nature of the Sruti construction.

Group B. Maxims of construction of texts and sentences by context ; that is, those which are chiefly of the character of Linga.

Group C Maxims involving grammatical construction, that is, those relating to the Vakya principle

Group D. Maxims of a somewhat free construction of texts and sentences, that is, those which proceed more or less on the lines of Prakarana principle.

Various considerations arise as to the interpretation of texts and sentences : such as to prevent interference with the literal meaning, to determine the meaning in doubtful cases, to settle whether a clause is to be taken as a complete sentence or is to be read with another clause, to distinguish between a reciting clause and an operative clause or to distinguish between a subordinate clause and the principal clause, and to differentiate between the primary law (Sruti) and the derived common law (Smṛiti).

Class II, Group A

21. *The Grahpatya Nyaya or household-fire maxim :* गृहपत्य न्यायः

This is the fundamental maxim of strict construction.

Strict construction.

22. *The Ratri Satra maxim :* रात्रिसत्र न्यायः

अथ रात्रि सत्राधिकरणं । प्रति तिष्ठन्ति इवै य एतारात्रिरुपयन्तीति भ्रूयते.....चिरजीविनो भवन्तीति यावत् एतावाप्तन्तौः प्रकरणात् अधिकार्ये उपयन्तीति ।

[Adhikarana Kaumudi, para 2 :]

That construction is preferable which is nearer to the literal

(x) The above classification has been borrowed from the learned work of K. L. Sarkar pp. 286-311.

Preference to literal construction.

construction, even though by it you get only a non-obligatory text and not an obligatory one. Udeechya Bhattacharya has placed Anusanga above Linga although generally Anusanga is regarded as a part of the Vakya principle which is inferior to Linga. But the point of the maxim is that it is better to presume a passage to be an Arthavada than a Vidhi as implied either by Linga or Vakya.

23. *The Prastara-praharana-Nyaya or the maxim of throwing grass into the fire.* प्रस्तरप्रहरण न्यायः [Jaimini III. ii. 5].

"The maxim lays down that words must be taken to mean what they express by vocabulary and grammatical inflection and not as mere stopgaps to complete a rhythm. There is the text '*Suktavakena parstaram praharati*' (he throws the grass by *Suktavaka*). The objector says 'by *Suktavaka*' means 'by making an intonation of the measure of a *Suktavaka*'. The conclusion is that the expression 'by *Suktavaka*' means by intelligently reciting *Suktavaka* and not by making a sound like that of the *Suktavaka*. This maxim in fact illustrates the axiom that every word must be taken to have an intelligible sense according to grammar and vocabulary."

24. *The Rathakara maxim :* रथकार न्यायः । [Jaimini VI. i. 12.]
This maxim lays down that where there is a text on a doubtful point, we should follow the text and not indulge in speculative reasons, as in the case of the *Rathakara* being entitled to sacrifice, though he is of a mixed caste.

The text having doubtful point.

25. *The Nishadasthapati Nyaya or the low-caste-priest maxim :* निषादस्थपति न्यायः । [Jaimini VI. i. 51.]

"When a compound word can be construed as a compound of an adjective and a noun (*Karmadharaya*), it should not be construed as a compound of two nouns (*Tatpurusha*), because the former combination is spontaneous while the latter is far-fetched."

Low-caste priest maxim.

The interpretation of the clause '*Nishadasthapati*' in the *Nishadasthapati* maxim may mean '*Nishada*' निषाद who was '*Sthapati*' स्थपति or *Sthapati* of the *Nishada*. *Sthapati* means a priest and *Nishada*, a *Chandala*. The first construction, being simpler, is adopted. Nilkantha relies on this maxim to support the right of a Sudra to perform or rather get performed the *Putreshti* Yagya.

26. *The Vaishwanara Nyaya or the maxim that subordinates merge in the principal :* वैश्वानर न्यायः [Jaimini I. iv. 11.]

"When a number of particular clauses collectively reproduce the purpose of a general clause, the particular clauses cannot be taken to create separate obligations in addition to that of the general clause."

Subordinates merge in the principal.

This maxim which lays down that *clauses forming part of a whole Vidhi proposition are not to be separately reckoned as an independent Vidhi*, has been illustrated by Jaimini [Taittiriya Samhita (II. 2. 5) cited in I. IV. 17 (Kunte's Ed.)] by referring to the following Vedic texts :

"He obtains children. He ought to prepare a cake called *Vaishvanara* baked on twelve potsherds. A cake baked on eight potsherds purifies, by means of the *Gayatri* metre and of *Brahma Varchasa*, the child if it be a son. A cake baked on nine potsherds places in him (the son) light by means of the musical metre called *Trivrit*. A cake baked on ten potsherds grants him (literally places in him) food by means of the *Virat* metre. A cake baked on eleven potsherds puts in him spirit (in the original *Indriya*) by means of the *Trishtubh* metre. A cake baked on twelve potsherds grants him (literally places in him) cattle by means of the *Gayatri* metre. When a son is born, a pure man performs this sacrifice."

The main clause in this passage requires cakes to be prepared on twelve potsherds; the intermediate clauses merely show the result of using 8, 9, 10 and 11 potsherds respectively. Each of these clauses is not a separate Vidhi, but merely explains the use of the twelve potsherds and their importance, twelve being the number enjoined. A similar instance may be given from modern Penal Code which lays down that when a man is found guilty of an offence which consists of several parts, each of which itself is an offence, the man is to be punished for the principal offence only. So the maxim in question practically deduces the same corresponding principle.

27. The Arthavada maxim : अर्थवाद न्यायः

There are clauses which are really parenthetical in a Vidhi text forming a gloss thereof. In the text "Sacrifice a white animal to *Vayu*, he is an angry god"

Arthavada maxim.

अथ अर्थवादाधिकरणम् । ... वायुर्वैदेपिष्ठा देवता ।

[Adhikarana Kaumudi para 28], the clause 'he is an angry god' is a parenthetical clause, descriptive of the divinity.

This maxim is very important and has been made use of by commentators and digest-writers. An Arthavada sentence may not be found in juxtaposition with the Vidhi text to which it corresponds. A text may be an Arthavada by Prakarana ; that is, it may be connected with some Vidhi stated somewhere else. These principles have been explained and illustrated in section IV of Chapter I.

Class II Group B

28. *The Mantra-linga Nyaya or the maxim of implied Vidhis :*
मन्त्रलिङ्ग न्यायः [Jaimini. I ii. 4].

Passages of the nature of Mantra (addresses and hymns) by their suggestive power imply Vidhis and are capable of being regarded as concomitants of the Vidhis implied by them.

Maxim of implied Vidhis.

29. *The Saptadasharatni Nyaya or the seventeen cubits' pillar maxim :* **सप्तदशरात्रि न्यायः** [Jaimini III i. 9].

When a statement of a subordinate character does not directly fit into the main obligation, in order to give it a useful meaning, it must be regarded as belonging to some incident of that obligation.

Pillar maxim.

30. *The Nivita maxim निवीतस्यार्थवादताधिकरणम्* [Jaimini III iv. 1]. This consists of statements in a series, culminating in an injunction. Of these, those which are only introductory to the injunction are to be treated as Arthavada, as in the case of the Nivita text.

Nivita maxim.

31. *The maxim that wearing gold ornaments and the like constitutes Manushya Dharma (individual virtue)*
Individual virtue maxim. **सुवर्णधारणादीनां पुरुषधर्मताधिकरणम्** [Jaimini III. iv. 8.]

32. *The Mitha-asambandha Nyaya or the mutually-unconnected-clauses maxim :* **मियोऽसम्बन्धः न्यायः** [Jaimini III. i. 12] :

'A subsidiary clause (*Guna Vakya*) is not generally to be taken as subordinate to another subsidiary clause because both are equally subsidiary to the main purpose and are thus co ordinates.'

Mutually unconnected clause-maxim.

The Mitha-asambandha maxim, also called the Baikankata Varana maxim is that by which the principle of *general clauses* is laid down. The Sutra on the subject runs as follows : " (General) subordinate clauses all relate to the ultimate purpose (of the Vedas), and as such one of them is not related to another, being co-ordinates ". **गुणानां च परार्थत्वादसम्बन्धः समत्वात् स्यात् ।** [Jaimini III. i. 22.]

Savara Swami explains this Sutra by referring to the two matters, *Agnyadhana* and *Pauvavana*, the former indicating the sacred fire and the latter denoting an offering to subserve the sacred fire. The latter is not subordinate to the former. They are both of use in the *Darsapaurnamasi* Yagya and in other Yagyas as well.

The following text gives the maxim the said name, "Vessels made of the wood of the *true Varuna* and of the *Baikankata* are declared as

fit to serve the purpose of sacrifices. But *Varuna* is not to be used for *Homa*, the *Baikankata* vessel is to be used in making *Homa*. Therefore the *Varuna* vessel is to be used generally in *Yagas*, except in ceremonies connected with *Homa*, and the *Baikankata* vessel also generally in ceremonies with *Homa*."

अग्न्याधेये वारणं वैकङ्कत पात्राणि अ होमार्थानि होमार्थानि च
श्रूयन्ते, तस्मात् वारणो वै यज्ञावचरः स्यात्, नत्वेतेन जुहुयात्, वैकङ्कतो यज्ञाव
चरः स्यात्-जुहुयादेतेन । न च व रणं वैकङ्कतानां पात्राणामग्न्या धेयेन सम्बन्धः ॥

[Savara Bhashya on Jaimini III. 1. 22.]

"In applying this text one is to remember, that both the directions, regarding the use of the *Varuna* wood and the *Baikankata* wood, are in the nature of general clauses. One of them does not stand in a subordinate relation to the other. But each of them is to be applied according to circumstances. The *Baikankata* vessel being suitable to *Yagyas* with *Homa*, is to be applied to such *Yagya*; and the *Varuna* vessel being unsuited to such *Yagyas*, is not to be applied to them. But if one were subordinate to the other, both of them would go together. *Jimutavahana* utilizes this principle in paragraph 70, Chapter 2, *Colebrooke's* edition. In fact, there being many *Gunavadas* in a particular *Shastra* it is necessary, to settle which of them go together and which of them are separate from each other."

33. *Mitha-sambandha* "otherwise called the *Vartraghni Nyaya* or the *mutually-connected-clauses maxim* : वार्त्रघ्नी न्यायः [Jaimini III. 1. 13]:

'When from the context it appears that a subsidiary clause (*Guna Vaky*) is reciprocally connected with a particular subsidiary injunction (*Guna Vidhi*), it is to be taken as restricted to that subsidiary injunction.'

Mutually connected clause maxim.

The *Mithasambandha* maxim is one of a converse character and is connected with the following text:—

"They recite the *Vartraghni* verses on the full-moon day, and the *Vridhanvati* verses on the new-moon day. In this text, the subordinate matters *Vartraghni* and *Vridhanvati* are linked together, so that one must precede and another follow, in course of the performance of the *Darsa-purnamasi Yagya*. This being so, they are connected with each other and are also inter-related. The *Sutra* says, 'subordinate matters are connected with each other, when they do not relate to the general purpose.' मिथ्यान्वयसम्बन्धात् । [Jaimini III. 1. 23]. Thus, these two maxims, between them, explain when two given *Gunavadas* (subordinate statements) go together and when they do not."

It has been explained that a statement occurring in a complex Vidhi text which is separable from the operative clause, and which is merely of the nature of a gloss upon it, is an Arthavada. But every statement occurring in a Vidhi text, in addition to the terms conveying the injunction, does not fall under this category. There may be a statement in a Vidhi text inseparately connected with its injunctive part; such a statement must be regarded as a part and parcel of the Vidhi.

34. *The Mushtikarandi Nyaya or the maxim of closing the fist etc.* मुष्टीकरणादीनां कृत्स्नप्राकरणिकाङ्गताधिकरणं [Jaimini III. i. 14]

"Where there are two or more subordinate clauses, embodying conditions for the performance of an action elsewhere stated, these clauses are not to be read as successively qualifying each other, but as co-ordinate, both equally bearing upon the action to which they relate."

Closing the fist maxim.

35. *The Suktavaka maxim :* सूक्तवाक न्यायः [Jaimini III. ii. 6]

"When a complex text consisting of parts indiscriminately refers to two cases, much of the complex text as is applicable to the one case should be applied to that case, and so much of it as is applicable to the other should be applied to that other."

Suktavaka maxim.

36 *The Angangi Nyaya अङ्गाङ्गि न्यायः or the maxim of the subordinate and the principal :* [Jaimini II. ii. 3]

"Where there is an isolated passage which is not complete, or requires to be attached to something else, it must be read into the texts regarding the intended main object."

The principal and the subordinate maxim.

37. *The maxim of the Incidental प्रतिपत्तिकर्मे न्यायः* [Jaimini IV. ii 4];

that is to say, the incidental is that which is of no eventual use though comprised in a transaction. The text is : 'The whole animal is to be offered but only the flesh is to be used for worship throwing off the blood and the intestine.' Here blood and intestine cannot be altogether avoided, though not required for the worship. They are *Pratipatti* (incidental). Thus if a Mimamsaka were present when the lady lawyer in the Merchant of Venice insisted on 'not a drop of Christian blood but a pound of flesh only' he would have confronted her by this maxim which made the shedding of blood incidentally necessary.

38. *The Abhikramananti Nyaya or the stepping-forward maxim :* अभिक्रमणादि न्यायः [Jaimini III. i. 10]

'A clause describing the manner in which an obligatory act is to be commenced, is not to be taken as optional, but as forming part of the obligatory act.'

Stepping forward maxim.

This maxim lays down this principle, the substance of which is: 'A clause describing the manner in which an obligatory act is to be commenced, is not to be taken as optional, but as forming a part of the obligatory act.' This maxim takes its name from the text: "He, going forward offers oblation by means of the conquest ceremony." अभिक्रामं जुहोत्यभिजित्वा इति [Savara Bhashya on Jaimini III. i. 19] 'With regard to this text the objector suggests that the act of 'stepping forward' should be read separately from the operative words of the *Prayatiya* (sub-ceremony); but it cannot be so separated and it must be read as a part of the ceremony. The Smṛiti law regarding the ceremony of *Putreshti Yagya* in connection with the act of adoption will better illustrate this principle. The question arises whether the act of adoption can be validly performed without a *Putreshti Yagya*; or in other words, is *Putreshti Yagya* separable from the act of adoption, and is the statement regarding it liable to be taken as an *Arthavada*? According to this maxim one cannot be separated from the other and they jointly constitute one *Vidhi*. The Privy Council has held that the performance of the *Yagya* is not necessary in cases of adoption by *Sudras*. This is so since *Sudras* are incapacitated from performing a *Yagya*.

39. *The Amiksha Nyaya or the whey maxim*: आमिक्षा न्यायः [Jaimini IV. i. 8]

'An act which is described merely as incidentally following an obligatory act, is not an obligatory act as in the case of the *Amiksha* text.'

Whey maxim.

It has also been shown that *Hetuvannigada* and *Vidhuvannigada* maxims lay down the principle that statements in the nature of reasoning and collateral statements are non-obligatory. There is another class of statements which expresses incidental sequences. These also have not the force of a *Vidhi*. *Amiksha* maxim lays down this principle, the substance of which is: 'An act which is described merely as incidentally following an obligatory act, is not an obligatory act.' It has reference to the following text: 'Bring curds and introduce into it hot milk, it is the *Amikshadish* to be offered to the *Vaishwadevas*. The whey is to be disposed of in other ways?' तप्ते पयसि दध्यानयन-स्यामिक्षा प्रयुक्ताधिकरणम् [Jaimini IV. i. 8].

As regards this text the objector says that as by the same act of mixing curds with hot milk (*Amiksha*) the solid portions and (the *Vajina*) the watery fluids are formed, both must be regarded as

sacrificial materials. The author replies that as the whey is formed only incidentally, the *Amiksha* (solidified milk) is the principal thing. It establishes the important principle that what is stated as an incidental sequence is not to be regarded as an essential part of a Vidhi text. This principle has been made use of while dealing with the law of adoption. The difference between statements of matters which are essential and those which are subordinate has been clearly set out by the Mimamsa writers.

The latter are called *Gunavadas* which are included in *Arthavadas*. Later Brahminical writers are often found to ignore this distinction and to take everything occurring in the *Shastras* as obligatory. The resultant effect of this is that very mischievous results arise as regards the right of two classes of persons, namely women and *Sudras*. There are many texts dealing with their disparagement merely of the nature of *Gunavadas*, yet they have been given the rank of *Vidhis*. But, as usage is an important factor of law, it is very difficult to undo the mischievous effects thus produced on the law of the country. Originally *Manu* and *Jaimini*, never made the status of women inferior to that of men nor did they in any way compromise their position. Yet later-day writers followed usage and laid down that women had no rights unless recognised by express texts. As regards *Sudras* also it is clear that their right to perform sacrifices has been restricted by express texts according to the principles of construction as given by *Jaimini*.

The proper construction of the texts of the *Shastras* clearly gives general rights to these two classes of persons subject to their curtailment by express texts. But it has been wrongly assumed that they have no rights unless given by express texts. It is mainly due to giving subordinate matters which are in the way of *Gunavadas*, the rank of *Vidhis*.

Class II. Group C

40. *The Ekavakyata or complex sentence maxim* एकवाक्यता न्यायः [Jaimini II i. 14]

"A complete sense makes a complete sentence, and where it is divided into two clauses, such clauses are interdependent upon each other."

Complex sentence maxim:

41. *The Vakyabheda Nyaya or the disintegration-of-sentences maxim:* वाक्यभेद न्यायः [Jaimini II i 15]

Disintegration-of-sentences maxim. "When the sentences are parallel and coordinate, they should not be read into each other."

The *Ekavakyata* maxim and its converse, the *Vakyabheda* maxim form the basis of syntactical construction which derives its importance from the absence of the system of punctuation

in Sanskrit as is found in other modern languages. The elaborate inflections (*Vibhakti*) of the Sanskrit grammar and the numerous recognized forms of combinations, called *Samashas*, remove the necessity of punctuation. These grammatical developments are subsequent to the Vedic era. Further difficulties in settling syntactical connections arise, and in the old Brahmaic literature the connecting links are either missing or are of an indefinite kind. But in the Smṛiti literature these difficulties are not so abundant.

42. *The Anusanga Nyaya or the ellipsis maxim*: अनुषङ्ग न्यायः [Jaimini II. i. 16]

"Where there is a number of incomplete clauses, followed by one which is complete by a finite verb, this last **Ellipsis maxim.** should be read at the end of each of the other clauses to make them complete."

This maxim is illustrated by Jimutavahana in his discussion on the following text of Manu: "It is admitted, that of a woman married by the ceremonies called Brahma, Daiva, Arsha, Gandharva and Prajapatya, the property shall go to her husband, if she dies without issue. But her wealth given to her on her marriage in the form called Ashura or either of the other two (Rakshasa and Paisacha), is ordained, on her death without issue, to become the property of her mother and of her father." (a)

"In the above text you find in the second sentence the words 'wealth given to her' before the words 'on her marriage in the form etc.,' Jimutavahana says that these words 'wealth given to her etc.' should also be inserted in the first part of the sentence after the words 'the property' by the principle of Anusanga. Thus Anusang means, that an expression occurring in a subsequent clause is often meant also for the clause or clauses preceding it; and that it is only for economy that it is expressly mentioned in the last clause only." (b)

The Adhikarana gives the following texts by way of illustration of the Anusanga principle: "Oh Agni! I offer my sacrifice to thee. I overcome (my) harsh tongue, I overcome my vexatious tongue, by the body latent in iron, latent in silver, latent in gold—(thy body oldest and lying in a cave " याते अग्नेयासया रजासया इरासया तनूर्वाषष्टा

(a) Colebrooke's Dayabhaga p. 17. Cf. Manu IX, 195, 197;

ब्राह्मदैवार्षगान्धर्वप्राजापत्येषु यद्वसु ।
अप्रजायामतीतायां भर्तुरेव तदिष्यते ॥
यत्त्वस्याः स्याद्धनं दत्तं विवाहेष्वासुरादिषु ।
अप्रजायामतीतायां मातापित्रोस्तदिष्यते ॥

(b) K. L. Sarkar—Mīmāṃsā Rules of Interpretation p. 308.

गह्वरेष्टो वचो अपावधी त्वेष वचो अपावधीत् स्वाहा । The passage with its ellipsis filled up would stand thus: "Oh Agni ! (it is by thy body) which (is) latent in iron (and) Oh Agni ! (it is by thy body) which (is) latent in silver, and Oh Agni ! (it is by thy body) which is latent in gold— (it is by thy body) oldest and lying in a cave that I overcome (my) harsh tongue, I overcome (my) vexatious tongue "

43. *The Angapurvabheda Nyaya अङ्गापूर्वभेद न्यायः* or the maxim that a separate limb of a Vidhi has a separate sanction : [Jaimini II, 2.1]

"Where there is a number of clauses, each of which is in the nature of a subordinate Vidhi clause, each of them should be construed as having separately the transcendental sanction."

44. *The Tadadi-utkarsha Nyaya or take-it-forward maxim :*
तदाद्युत्कर्ष न्यायः [Adhikarana Kaumudi]

"Where a preceding clause is wanting in something, which is indicated in a following passage, the thing indicated may be read into the former clause by way of anticipation."

Take it forward maxim.

45. *The Tad-apakarsha Nyaya or take-it-backward maxim :*
तद अपकर्ष न्यायः (Adhikarana Kaumudi)

"When the reverse is the case, the reverse process should be adopted."

Take-it-backward maxim.

Tadadi-utkarsha and *Tadapakarsha* maxims are particular cases of the Anusanga maxim. In *Tadapakarsha* a clause, occurring in a subsequent sentence, is to be read over again in a previous sentence, but in *Tadadi-utkarsha* the reverse is the case. By these maxims a sentence is bodily transferred from one place to another. Generally, it is not permissible excepting in rare cases. In Sutra 24, Chapter II, Book I, Jaimini distinctly disapproves *Padapakarsha* (transference backward), where it is possible to avoid it by taking a clause to be a *Prakarana*. प्रकरणे सम्भवन् अपकर्षो न कल्पयेत् विधानार्थक्यं हि तं प्रति ।

These maxims are not restricted to transferring clauses backward and forward but are also applicable in adjusting the time of application of texts by shifting the time backward and forward, when two texts happen to point to the same time for their application. This matter may be illustrated by a passage from *Adhikarana Kaumudi* of *Udechya Bhattacharjee* : "There is one text, enjoining the performance of Homa just at the moment the sun rises. There is another text enjoining that one should bathe just at the moment." This being so, *Apakarsha* would enjoin bathing before the rising of the sun and the Homa at its time. Then he gives a similar case of *Utkarsha*, "The Sapiṇḍa

Saraddha is to be performed in the afternoon and then the annual Saraddha. But the time appointed for the annual Saraddha may fall at noon. Whenthis is so the annual Saraddha must be shifted forward by Utkarsha."

46. *The Upavita Nyaya or the sacred-thread maxim*: उपवीत न्यायः [Jaimini III. i. 21]

'When between two descriptive clauses, a finite verbal clause intervenes, they are to be regarded as separate propositions, when there would be doubt as to there being an identical proposition as in the case of the Upavita text.'

This maxim relates purely to syntax. The text, illustrating it, is summarised as follows: In the Prakarana of the Darsha-paurnameśi Yagya in the 7th and 8th *Anuvaka* there is a description of the subordinate Yagya named *Samidhini*. In the 9th *Anuvaka* there is a description of the Nivita ceremony preceded by some injunctions. In the 10th there is some matter connected with the subordinate *Samidhini* ceremony. In the 11th there is the injunction about the *Upavita*. Now the question is this. Is the *Upavita* ceremony a *sub-prakarana* of the *Darsha-paurnameśi* through the subordinate *Samidhini* ceremony or is it a direct Prakarana of the *Darsha-paurnameśi Yaga*? But between the 8th and 10th *Anuvaka* there is the 9th, which has nothing to do with the *Samidhini*. The answer is that the *Upavita* ceremony must be taken to be a direct Prakarana of the *Darsha-paurnameśi* and not its *sub-prakarana* or a part of the *Samidhini*.

47. *The Isan-shyeniyavishesha dharmatidesha Nyaya* or the maxim which means that 'references for details are proper between what are equal and similar' ईषीश्येनीय विशेष धर्मतिदेशाधिकरण [Jaimini VII. i. 2]:

48. *The Maitravaruna maxim*: मैत्रावरुण न्यायः [Jaimini IV. ii. 6]

"When an act is to be done and not assumed as done as in the case of handing over the staff to *Maitravaruna* a priest, it is in the nature of an enjoined act and not merely a recited act retrospectively considered."

The question is whether the text, 'he gives the staff to the Maitravaruna priest' is a proposition which contemplates by its context a purpose as already fulfilled, or a purpose to be fulfilled. The answer is that it is the latter, and so indicates a duty to be done (*Arthakarma*) and does not merely indicate the end of a duty. Nilkantha has made use of this maxim regarding the question of the eligibility of daughter's and sister's son for adoption.

Class II. Group D

The maxims of this group mostly allow free construction and are based on considerations of necessity, expediency and convenience.

49. *The Krishnala Nyaya or the black bean maxim* कृष्णल न्यायः [Jaimini X. ii. 2]

"When, by reference, what is contained in one text is to be transferred to the subject matter of another text, the whole of the former text should not be bodily transferred, but such portions only as are not inconsistent with the latter text."

Black-bean maxim.

50. *The Kshameshi Nyaya or the burnt-offering maxim* क्षामेष्टि न्यायः [Jaimini VI. iv. 5]

"When a rule, in prescribing the mode in which an act should be done, enjoins that a certain quality should be thoroughly secured, it should be taken only to mean the securing of such a degree of thoroughness as can be reasonably expected."

Burnt-offering maxim.

51. *The Swara (chip of wood) maxim*: स्वरोच्छेदनाद्य प्रयोजकताधिकरणम् [Jaimini IV. ii. 1-6]

"When one construction would secure convenience and economy, and another imposes labour and fruitless trouble, the former is the proper construction."

Chip of wood maxim.

52. *The Samanasyat maxim*: समानस्यत न्यायः

"When one thing is given to more than one person it must be equally divided among them, in the absence of any direction to the contrary. There is the text: 'In the ceremony of the exhibition of gold, let horses be given to the *Udgatri*, *Prostotri*, and *Pratitotri*.' Such being the direction the horses are to be equally divided as the *Sruti* approves of equal division."

53. *The Kaimutika maxim*: कैमुतिक न्यायः [Jaimini I. i. 32]

"Rhetorical flourishes, meant to indicate that which applies to a case, a *fortiori* applies to a case close at hand, should not be literally understood."

Kaimutika maxim.

The following maxims are of special character and are based on considerations of social benefit or religious purity :

54. *The Anritvada maxim*: अनृत वदन निषेधस्य क्रतुधर्मताधिकरणम् ।
or the maxim that the prohibition of speaking untruth is positive law. [Jaimini III iv. 4]

"The text, by which speaking falsehood is prohibited, though seemingly it is merely the recital of a moral law, should be read as a positive injunction."

Prohibition of speaking untruth.

55. *The maxim of the absolute of the three debts ऋणत्रयस्य नित्यताधिकरणम् ।* [Jaimini VI. ii. 11.]

"A text, which declares that a Brahmin has the three-fold duty of sacrifice, learning and maintaining the household, must be understood to enjoin those duties absolutely, and as belonging to all the three castes."

Three debts maxim.

56. *The Udbhida and Chitra maxim : चित्रया यजेत न्याय :* [Jaimini I. iv. 2]

"When a text only indicates the performance of a ceremonial act under a certain name, but there is no text forthcoming enjoining the act and there is no sanction, it is to be read only as a text of nomenclature."

Chitra maxim.

57. *The Tad Vyapadesha Nyaya or the simili maxim : तत्त्व्यपदेश न्यायः* [Jaimini I. iv. 5]

"When a text, if literally construed, would be subversive of the main purpose (*Pradhana Chodana*), and when it is possible to construe it as a description or name, it should be so construed."

Simili maxim.

SECTION 4. MAXIMS REGARDING NEGATIVE RULES AND CONFLICT OF TEXTS

The negative texts relate to prohibitions both as against all the world as well as those against particular persons. This distinction, as explained by the Mimansakas, is similar to that between judgments or rights *in rem* and judgments or rights *in personam*. The term '*Pratishedha*' is applied to the former class of prohibitions while '*paryudasa*' to those of the latter class. For example: the text 'Do not eat fermented food' is a *Pratishedha*, but 'those who have taken the Prajapati vow must not see the rising sun,' is a *Paryudasa*.

Pratishedha & Paryudasa.

They are each sub-divided into two classes. As regards *Pratishedhas*, the sub-divisions are: (i) those which prohibit a thing without any reference to the manner in which it may be used, and (ii) those which prohibit it only as regards a particular mode of using it. For example; 'Do not eat fermented food' prohibits the use of it under all circumstances, while 'Do not use *Shodsin* vessel at dead of night' forbids the use of the vessel

Their classification.

only at the dead of night. In the two sub-divisions of Paryudasa the first relates to a person performing some specified act which is not enjoined by a Vidhi, as in the case of the Prajapati vow, while the other relates to a person engaged in performing a Vidhi; for instance, one is to do Sraddha during the full moon by virtue of a Vidhi but not in the night of the full moon. The prohibition of doing Sraddha in the night is a Paryudasa which is a sort of an *exception* or *proviso*, as 'not in the night' is an exception to the rule 'Perform the Sraddha during the full moon'.

There are four classes of negative clauses: (i) a condemnatory prohibition, *e.g.*, the *Kalanja* (fermented food) clause; (ii) absolute prohibition of things under certain circumstances, *e.g.*, Shodsin vessel; (iii) prohibition in relation to persons in a given situation *e.g.*, *Prajapati* vow; and (iv) restrictions as to action of persons engaged in fulfilling an injunction, in respect of the time, place or manner of carrying out the substantive part of the injunction.

The above distinctions are very important and must always be borne in mind, otherwise one can never follow the Mimamsa writings. The second and the fourth classes are generally met with in the Vyavahara law, and the first and the third in the Vedic law. Really speaking, the first class of Pratishedhas are moral prohibitions condemning acts which are sinful, and the third class which are Paryudasa, being in the nature of religious vows, are rules affecting religious discipline. They, therefore, appertain to the Vedic law. The remaining two occur in the Vyavahara law.

Smriti writers have also introduced the question of the applicability of equitable principles as against the strict letters of the Smriti law giving rise to conflict of interpretation. The word *artha* is used in matters of litigation in the sense of relief sought. The words *arthi* and *pratyarthi* are used for plaintiff and defendant, so the expression 'Artha Shastra' means the rules of equitable relief. The conflict between Smriti texts and Artha Shastra (equitable principles) has been formulated by Smriti writers.

Thus the subject of conflict would require consideration between one spiritual rule and another; of conflict of one Vyavahara Vidhi (civil law rule) and another; and of conflict between the Vyavahara Smriti texts and equitable principles (*Artha Shastra*). There are two more topics allied to the subject of conflict which may be mentioned: (i) the application of alternative texts when the alternative events occur simultaneously or one after the other; (ii) the adjustment of two positive Vidhis, one of a general character and the other of a particular one. This class of maxims may, therefore, be classified as follows:—

Group A. Maxims regarding Pratishedha or prohibition proper.

Group B. Maxims regarding Paryudasa or exceptional and qualified prohibitions, and the like.

Group C. Maxims relating to alternative causes and the adjustment of general and particular Vidhis.

Group D. Maxims relating to the equitable application of Smṛiti texts (a).

Class III Group A

Maxims regarding Pratishedha or prohibition proper :

58. *The Kalanja maxim:* कलङ्ग न्यायः

“A general condemnatory text is to be understood not only as prohibiting an act, but also the tendency, including the intention and attempt to do it.” [Jaimini VI. ii. 5]

Four maxims
regarding Pra-
tishedha.

प्रतिषेद्ध कर्मणामनुष्ठानेऽनिष्टापाताधिकरणम् ।

The Kalanja maxim consists of the following two Sūtras of Jaimini [VI. ii. 19 and 20] :

(1) “In an absolute prohibition a positive struggle is the result ; for, the prohibition is to be secured by abstention from the prohibited act.”

प्रतिषेधेऽप्यवकर्मत्वात् किंवा स्यात् प्रतिषिद्धानां विभक्तत्वादकर्मणाम् ।

(2) This objection is answered thus in the other Sūtra : “If effect be given to the Śāstra, man is benefited ; when Śāstra is divorced from its object then it becomes a case of transgression of the law.”

शास्त्राणां त्वर्थवत्त्वेन पुरुषार्थो विधीयते तयोरसमवायित्वात्तादर्थ्ये विध्यति क्रमः ।

The following translation of Dr. Thibaut's Laugakshi Bhashkara's explanation of the Kalanja maxim and of a Pratishedha in the matter of condemnatory prohibitions, will explain the subject better:—

“By prohibition (*Nishedha*) we understand turning off man (from some action), for the purpose of sentences of prohibition lies exclusively in their effecting (man's) turning away from actions which would be cause of some disadvantage. The details are as follows. In the same manner as an injunction conveying an instigation in order to give effect to its instigatory power intimates that the thing enjoined, for instance, the sacrifice, is the instrument for obtaining some desired result and thereby instigates the person towards it, in the same manner a prohibitory passage, as for instance, “he is not to eat *kalavya*” conveying the idea of turning off (from some action) in order to give effect to its power of

(a) The classification as well as the treatment has been very gratefully adapted from K. L. Sarkar's learned treatise 317-19.

turning off, intimates that the thing prohibited, as for instance, the eating of *kalanja*, is the instrument of bringing about some highly undesirable result and thereby turns man off from it. If it is now asked how a prohibitory sentence conveys the idea of turning off from some thing, we answer as follows. The sense of the word "not" is not connected with the sense of the root (of the verb in the prohibitory passage); for although the two words stand in immediate proximity the sense of the root presents itself as standing in subordinate relation to the actual creative energy (*Arthibhabana*) which is expressed by the suffix (of words like '*Bhakshayet*'). For something which presents itself as standing in subordinate relation to one thing cannot be connected with something else. Otherwise, in the sentence "bring the king's man" (lit. the king-man, *raja-purusha*) the king himself would enter into relation with the action (while in reality the king only stands in relation to his servant, the latter in his turn being the object of the action expressed by 'bring'.")

Laugakshi Bhashkara, taking the prohibitory text "One is not to eat *Kalanja*" (*Na kalanjam bhakshayet*), explains the idiomatic force of the phrase (*Na bhakshayet*). The author explains that the suffix '*yet*' means '*shall*' and that the negative particle '*not*' is to be taken as attached to the suffix '*yet*' (*shall*), and not to the idea of *Kalanja* eating. For if it be taken as attached to the latter idea, then the sentence might mean, 'you shall eat but not *Kalanja*.' In this case there would be no prohibition. So he labours to demonstrate that the gist of the sentence is '*shall not*,' and therefore the object of it is to turn off from eating *Kalanja*. This may appear to be making a hair-splitting distinction, but it is of importance from the Mimamsa point of view, as will presently appear. The explanation of Nishedha Vidhi becomes more clear from Jaimini's Sutra of the *Kalanja* maxim.

The objector says, "In a case of prohibition, mentally you entertain the idea of the action prohibited; for, you have to discriminate between the prohibited act and the negation of that act."

The objector means to say, 'what is the good of a prohibition when it invites the imagination to gloat over the action prohibited?' The author answers, "When an act is enjoined by the Shastra, it is for the purpose of the good of a person; if the good object be divorced from the meaning of the Shastra, then it becomes a case of transgressing it." [Jaimini VI. ii. 20]

The meaning is this :—

In a case of prohibition you must take it that not only is the particular external act prohibited, but also the very intention of it which makes the act evil. Roughly speaking, the principle laid down

can be enunciated as follows :

In a case of prohibition one should not abstain from the very idea of the act prohibited, and there ought to be no evasion of the Vidhi in any way.

Thus this class of Nishedha Vidhis is to be interpreted most comprehensively. If the thing be prohibited, it cannot be used even as a substitute for another thing." प्रतिषिद्धद्रव्यस्य प्रतिनिधित्वाभावः ।

[Jaimini VI. iii. 6.]

In fact, this broader interpretation of the Nishedha Vidhis has been carried so far that when a thing is prohibited, if it be transformed by combination with another thing into a new substance, even that new substance is not permitted to be used. This is supported by the black-kidney-bean maxim which is referred to both by Jimutavahana and Vijñaneshwara.

It may be argued that no reason is assigned why Pratishedha Vidhis of this character should be so broadly construed. But you should remember that the Nishedha Vidhi dealt with by the Mimansakas relates generally to *Purusha Dharma* (duties of a religious and moral character). The word *Purushartha* is expressly mentioned in Sec. 20, Chapter II, Book VI as its explanation. In fact, it has been explained by later writers that Pratishedha is generally directed against some particular vicious tendencies in men. In such a view of the Pratishedha, the principle of construing it comprehensively cannot be said to be improper.

'*Na hinsyeta*' न हिंसेत । (one should not injure another), '*Nanirtani vadeta*' नानृतं वदेत् । are examples of Nishedha Vidhis as given in the Vidhi Rasayana, page 123, Benares series. *Na kalanjam bhakshayet* न कलज्जं भक्षयेत् (do not eat *Kalanja*) is also a Nishedha Vidhi (a).

59. The Shodsin-cup maxim: षोडशिन न्यायः

"Where one and the same thing is once enjoined and then prohibited, this is a case of direct conflict, and accordingly not reconcilable."

Jaimini X. viii. 3].

नाति रात्रे गृह्णाति षोडशिनमित्यादि निषेधस्य विकल्प रूपताधिकरणम् ।

Shodsin maxim explained.

"The Shodsin maxim treats of a conflict not between a condemnatory prohibition as in the *Kalanja* maxim and some thing opposed to it, but as between a prohibition, as recognized by recent writers, of the essential element of some definite positive proposition. For instance, there is the proposition; 'Use the *Shodsin* vessel at the dead of night.'

Against this, there is the text, 'Do not use the *Shodsin* vessel at the dead of night.' This is a case of direct conflict, and there cannot be any attempt to reconcile the two. In such a case, option to follow one or the other rule is the only course left. But, if against the proposition 'Use the *Shodsin* vessel at the dead of night' you have the proposition, 'Do not use the *Shodsin* vessel at the dead of night during a new moon time,' this will not be a contradiction, but the second proposition will be read as a Paryudasa (exception), which does not affect the essence of the first proposition."

60. The *Dvayo pranayanti* maxim: द्वयोः प्रणयन्ति न्यायः

"The same text should not be once taken as a case of Paryudasa (mere exception), and again as a case of Pratishedha (prohibition proper)." [Jaimini VII. iii. 9.]

This maxim lays down the simple principle that one should not blow hot and cold at the same time. The maxim originated from the following texts relating to the four-monthly Yagya which is a *Vikrīta* (development) of the *Darsha-paurnamasi* and not of the *Shamuka Yaga*, as some opponents (*Purvapakshinas*) thought :

Maxim explained.

(1) "*Upa atā vapanti.*" उपात्र वपन्ति ।

"In this (four-monthly Yagya) the northern altar is to be established."

(2) "*Na vaishwadeve Uttaravedum upakiranti na Sunasherye.*" न वैश्वदेवे उत्तरवेदिमुपाकिरन्ति न शुनाशीर्ये ।

"The northern altar is not to be established either in the *Vaishwadeva* quarter or the *Sunasherye* quarter of the Yagya."

(3) "*Uroo va etau yajnyasya yat varuna-praghasah Shadhwaiti Dvayo pranayanti.*" उरु वा एतौ यज्ञस्य यत् वरुणप्रघासः शाकध्वेति द्वयोः प्रणयन्ति

"The two mainstays (legs) of the Yagya are the *Varuna-praghasa* and the *Shadhwaiti*. The two must have fire kindled on them."

The four-monthly Yagya consists of four sections. The first is *Vaishwadeva*, the second is *Varuna pradhasha*, the third is *Shadhwaiti* and the fourth is *Sunasherye*, each forming a quarter of the whole ceremony.

The first text lays down the general rule that the northern altar, which is inevitably connected with fire-kindling, should be established in the Yagya. The second text lays down that the northern altar is not to be established in the first and last quarters of the Yagya *vis.*, in *Vaishwadeva* and *Sunasherye*. The third text, after explaining the

importance of the second and the third quarters (*Varuna Praghuṣṭa* and *Shakadhvanti*), lays down that the fire kindling should take place in the two.

Jaimini construes the three texts as follows :

The first text is a general rule (*Samanya Vidhi*). The second is an exception to it. The third is an Arthavada (reciting clause) which shows the reason why the second and third are not subjected to any exception in respect of fire-kindling.

The above construction reconciles the three texts and does not introduce any conflict such as would result in an option (*Vikalpa*).

But the opponents would not construe the texts in that way. They argue as follows :

We concede that the first text is a general Vidhi, and that the second is a special negative Vidhi by way of an exception. But the exception is as regards the northern altar and not as to the kindling of fire.

This being the case 'we would' they proceed to say, 'hold that the clause 'Dvayo-pranayanti' which occurs in the third text is intended to apply to the first and the last quarters (the *Vaishvadeva* and the *Sunasherye*). For, these are in need of such a clause to enable fire-kindling, as the provision prohibiting the northern altar in respect to them raises a difficulty in the way of fire-kindling whereas with regard to the second and the third texts, the clause would be a superfluity, the fire-kindling in these two being already provided by the general rule (*Upa atra vapanti*).'

The opponents thus make out the case of kindling of fire in the *Vaishvadeva* and the *Sunasherye*. But on what is it to be kindled ? So they are yet in need of the altar. This they make out in the following way. They say that there is a virtual conflict between the second text and the first, in as much as the first text by the clause '*atra upavapanti*' prescribes the kindling of fire on the northern altar in all the four ceremonies and the second text prohibits the northern altar in two of the ceremonies. They proceed to hold that by reason of this contradiction, an option is given, and they should take advantage of this option to make the northern altar in *Vaishvadeva* and *Sunashiri* just as in the other two.

The Mimamsakas say that this argument constitutes (*Vidhi vaishanya*) inconsistency of legal rules.

The Mimamsakas expose the fallacy as follows :

"They say that the opponents once read the first text (the general Vidhi) as subject to the exception contained in the second text. They read it as an absolute rule side by side with the second text which is

read equally as an absolute rule creating contradiction. They get the fire by the first view. This is bad and cannot be tolerated.

"The tussle between Srikara Misra and Jimutavahana as exhibited by the latter, very largely illustrates how Mimamsa principles are respected and applied by Hindu jurists. The two authors fight over the construction of certain texts of Yajñavalkya regarding the right of succession as between united and separated, and as between uterine brothers and half-brothers. With reference to the text, 'The united brother succeeds' and the text 'The uterine brother succeeds,' Srikara Misra argues that to make out from these the proposition that a united half-brother takes equally with a separated uterine brother, one is to incur the fault of the *Dvayo-pranayanti* maxim. For, in order to support this proposition, he must once read either of the two texts as simply giving the right of succession, and again as giving a comparatively preferential right. By the one reading you get the right of a united half-brother and a separated uterine brother to succeed, and by the other reading you get the equality of their position as they would both occupy the same preferential position with reference to a separated half-brother. Srikara maintains that such a double reading is wrong. Jimutavahana, however, supports the proposition by a variety of arguments, as will be seen later on."

The effect of this maxim may be summarised thus. A positive and a negative text may either be in conflict with each other or not. If there are reasons to believe that they are in conflict, the view must be stuck to, otherwise not, and one should not be allowed to shift one's position at pleasure. There is no doubt that the conflict occurs in cases like that of the *Shodsin* maxim. There is no conflict when the negative text is a *Paryudasa*. Also, there is no conflict, when by the force of the *Kalanja* maxim, a practice standing in the way of a condemnatory prohibition must be swept off.

A practice in opposition to a *Pratishedha*, is only saved where there is clear ground to hold, that the *Pratishedha* does not extend to the essence of the practice which is apparently in conflict with it. Such a case is discussed by Raghunandana. He takes up the rules sanctioning the immolation of animals for purposes of sacrifice and raises the objection that these rules must be treated as nullity by virtue of the general negative *Vidhi* condemning the destruction of animal life—'*Na hinsyeta*.' He gets out of this objection by showing that the word '*hinsyeta*' does not include in its meaning killing by way of sacrifice.

But such an argument cannot hold good in the case of the general negative *Vidhi* '*Naṁṛtam vadeta*' (do not speak falsehood) with

reference to the observation of Manu, wherein he says that a man may tell a lie to save the life of a Brahmin. If 'Nanirtam vadeta' be a general prohibition of telling lies on the part of those who have the privilege of performing Yajnas, then it cannot be argued that the telling of a lie to save a life is not within the general negative Vidhi—'Do not speak a falsehood.'

So the observation of Manu mentioned above must be taken as not having the force of a Vidhi, but as merely indicating that the violation of the general Vidhi may in the case referred to be excused (b).

61. *The Pratishidha-dravya maxim* : प्रतिषिद्धद्रव्य न्यायः

"That which is forbidden by a general condemnatory Vidhi cannot be used in any shape, for instance, even as a substitute for another thing." प्रतिषिद्ध द्रव्यस्य प्रतिनिधित्वाभाव न्यायः [Jaimini VI. iii. 6]

Class III. Group B

Maxims regarding PARYUDASA, qualifying and qualified prohibition etc.

62. *The Pradeshanarabhaya maxim* : प्रदेशानारभ्य न्यायः

"A prohibition that merely displaces a part of the descriptive clause of a Vidhi text, is merely a qualifying prohibition of the nature of an exception." [Jaimini X. viii. 7] :
Four maxims regarding Paryudasa.

प्रदेशानारभ्यविधानयोर्निषेधस्य पठ्युदासताधिकरणम्

63. *Na tau pasau karoti maxim* : न तौ पशौ करोती न्यायः

"When a negative clause merely declares that a certain thing does occur in an Utpatti Vidhi, such a clause is to be taken not even as a Paryudasa but as an Arthavada." [Jaimini X. viii. 2]

न तौ पशौ करोतीत्यादिनिषेधस्यार्थवादताधिकरणम् ।

64. *The Sanyoga-prithaka maxim* : संयोग पृथक् न्यायः

The same thing may be used to serve a subordinate purpose, and again to serve a principal purpose.

65. *The Abhimarshana maxim* : अभिमर्षण न्यायः [Jaimini III. vii. 4]

is also to the same effect.

Explanation and detailed treatment of the above maxims. Paryudasa is explained by Laughakshi Bhashkara thus :—

"Where there is however an obstacle in the way of the word 'not' being connected with what is expressed by the verbal suffix, it is connected exclusively with what is expressed by the root itself. Such obstacles are of two kinds : (1) The beginning with the phrase, such as

"his vowed observances are as follows," and (2) the contingent probability of a Vikalpa (option)."

"An example of the former kind is, for instance, found in the following passage, 'he is not to look at the rising Sun', as this sentence is read after a commencement has been made with the words 'his vowed observances are as follows'."

Laugakshibhashkara's view, as expressed above, is that in a Paryudasa the prohibition is not in the form of "shall not intend the doing of the thing but only in the nature of a direction that the thing should not be done under particular circumstances." Further he intimates that where by construing the prohibition as absolute, one would be forced to the use of an option, the prohibition should be construed, if possible, as a Paryudasa only. For instance, in the case of the text, "he is not to look at the rising Sun"; as this is stated to be in fulfilment of a vow, it is a self-made rule applicable only when the vow is made. Therefore it is a Paryudasa.

In the first Adhikarana of Ch. VIII, Book X, which has been called Pradeshanarambha maxim, Jaimini explains Paryudasa as follows :—

"Where the leading clause of a passage contains a general direction for the performance of a certain act there is a prohibition of it under certain circumstances, the prohibition is to be taken as a legitimate exception or *proviso* (Paryudasa)." [Jaimini X. viii. 1].

प्रतिषेधः प्रदेशेऽनारभ्यविधाने च प्राप्तप्रतिषिद्धत्वादिकल्पः स्यात् ॥

The English principles of interpretation on the subject, as given by Maxwell are as follows : "An author must be supposed to be consistent with himself; and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the legislature is treated in the same manner as that of other authors; and the language of every enactment must be so construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it. But it is impossible to *reconcile contradictions*, if the provisions of a later Act are so inconsistent with, or repugnant to, those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later." (a)

The principles as regards such a conflict are essentially the same in the Mimamsa system as in the English system. But the

diversity of the contents of the Smṛiti which is also presumed to emanate from the same source as the statute law, is very great, and the apparent incongruities among various passages are far more numerous than in the case of statute laws. So Mīmāṃsā rules on the subject are numerous. Jaimini's rules as to the reconciliation of a seeming conflict by taking a prohibitory clause as an Arthavāda and in the case of a seeming conflict between an Apurva Vidhi and a prohibitory clause consistent with it—are very helpful in connection with the interpretation of the Vyavahara law.

In this respect the difference between a Paryudasa and a Pratishedha is of great importance. Owing to the fact that such difference has not been properly appreciated by certain courts, they have arrived at erroneous conclusions, as, for instance, when they have held that if a person having inherited property, subsequently incurs one or the other of the disabilities recognised by law, he is not to be divested of the property already inherited by him. There would have occurred no difficulty if the fact of the rule of exclusion from inheritance being a Paryudasa and not a Pratishedha had been thoroughly understood and the rules of exclusion being Paryudasa could not possibly extend beyond the time when the succession opened, as they refer to that time only. On the other hand, if these rules had been Pratishedha, then, by the Kalanja maxim they would have had a far reaching effect, and in that case valid arguments would have been necessary to secure a liberal working of the law. Again, the rule that the children of disqualified persons are not debarred from inheriting, is also easily explained by the fact that the rules are merely Paryudasa.

"Mīmāṃsā writers raise the following question with regard to an exception (Paryudasa). If a general negative Vidhi be violated, there is a penance for the violation; for, to observe the negative Vidhi is a duty. But is a violation of an exception also to be visited with a penance? Some answer, no. Because to observe an exception is by itself no duty. Take for instance, the text discussed by Raghunandana,—*"The Parvāṇa Śrāddha must be performed during the new moon but not in the night."* Here the words in italics form an exception. Suppose a man performs the Śrāddha during the new moon but in the night. The effect is that he gets no benefit from the performance of the Śrāddha. But he commits no positive sin. He is only guilty of the omission of performing the general Vidhi. Raghunandana, however, says that in some cases the violation of a Paryudasa (exception) is visited with a penance, as if it were a positive independent Vidhi." (a)

Class III, Group C

Maxims relating to alternative clauses and to the adjustment of general and particular Vidhis:

66. *Apachheda* (losing hold) *maxim*: अपच्छेद न्यायः ।

"If a certain consequence is attached to an event, failing which another consequence is attached to another event, in such a case both the events occur simultaneously the consequence is optional." [Jaimini VI. 17.]

Two maxims relating to alternative clauses, etc.

If of the two alternative events, both happen one after the other, then that which happens last, is given effect to ignoring that which happens first.

When two different effects are respectively attached to two events alternately, if both happen simultaneously, either effect may be attached, but if one event follows the other, the result will conform to the event that happens last. This rule is similar to the Roman rule that out of the two repugnant clauses of a will, the last shall prevail. The principle is illustrated thus :—

Losing hold maxim explained.

"In the Yotishtoma Yagya, the priests come out of the hall one behind the other, each holding the backrobe (*Kachha*) of the person going before. If the *Udgata* loses hold, the Yagya must be finished without Dakshina, and a fresh Yagya must be performed in which the presents intended to be given in the Yagya, ought to be given. If the *Pratihota* loses hold, the sacrificer must make a gift of all his possessions.

"With regard to the texts as above mentioned two difficult contingencies may arise :—

(1) If both the priests, the *Udgata* and the *Pratihota* lose hold simultaneously, what is to be done ?

(2) Suppose again that both lose hold, but one after the other, whose failure is to settle the consequence ?

"With regard to the first case, the Adhikarana consisting of Sutras 51, 52 and 53 decides, that the two failures having taken place simultaneously, the case becomes one of direct conflict, and therefore, option results. For, the consequences of the failure of the one and that of the failure of the other are contrary to each other and they cannot be reconciled. Therefore, if both the *Udgata* and *Pratihota* lose hold simultaneously then either a fresh Yagya is to be performed and only the intended presents made, or the sacrificer is to give away all that he has. As regards the case of one losing hold after the other, the Adhikarana in Sutra 54 decides, that the sacrificer will have to make a fresh sacrifice with the intended presents, if the *Udgata* lose hold last, and he will have to give away all his properties if the *Pratihota* lose hold

last. In other words, the result will be in accordance with what happens last. Savara Swami gives elaborate reasons for this conclusion.

"The Sutra on the point is very generally worded. It runs as follows :—

"If one precedes and another follows, the preceding becomes weaker as in nature." **पौर्वापर्ये पूर्वदौर्बल्यं प्रकृतिवत् ।** [Jaimini IV. v. 54].

"Evidently, it is with reference to the above Sutra that the following rule has been enunciated by Dr. Siromani :

"When in order to establish any particular proposition, several reasons are given in successive clauses, each successive reason being preceded by such words, as *kincha*, *yadva*, etc., then the reason last given is to be accepted as the opinion of the author."

Sree Bhatta Sankara also states that if two successive clauses are in conflict, that which precedes is barred by that which succeeds. This he places among the rules of *Praptabadha* (exclusion by necessary implication).

This principle is analogous to the following principle of the English Law of Interpretation :

"And if the provisions of a later Act are so inconsistent with, or repugnant to, those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later." (x)

67. Maxim of the general and the particular **ह्यगस्येवाग्नी-
षोमीयपशुताधिकरणम् ।** [Jaimini VI. viii. 10]. When there are two rules on the same subject, one general and the other particular, the particular rule prevails.

A Sruti is to the effect that the *Agnisomiya* animal shall be sacrificed. The objector insists that as the injunction leaves the question open, one can sacrifice any animal, *i. e.*, any quadruped. But the author argues, at great length, to establish that this general injunction is purposely limited by the specific Mantra pointing to the goat as the proper animal for sacrifice. So only a goat is to be sacrificed.

It is noteworthy that both the rules are positive in this maxim. Any express maxim dealing with the case of a general negative rule and a particular negative rule or any exception to a negative Vidhi is not found. The only similar topic which touches these two questions is the topic of the *Dan pashu* maxim, of which the particular negative Vidhi prohibiting the use of two *Ajyabhagas* in the *Pashu Yagya* is directed to be taken as an Arthavada, as such *Ajyabhagas* would not be allowable in the *Yagya* even without this prohibition. The particular

negative Vidhi merges in the general negative Vidhi, if any, and thus becomes a mere Arthavada.

Class III. Group D

Maxims relating to the equitable application of Smṛiti texts (x):

These are not strictly speaking maxims, but rules laid down by the Smṛiti writers.

68. "*Smṛiti is of greater authority than principles of equity.*"
(Yajñavalkya Ch. II. 21) अर्थशास्त्रास्तु बलवद्धर्मशास्त्रमिति स्थितिः

69. "*If possible the principles of equity should be reconciled with the text law.*"

70. "*In the case of a conflict between the text law and the principles of equity, the latter must be discarded and the former followed.*" [Yajñavalkya I. 39] यत्र वितिप्रतिपत्तिः स्याद्धर्मशास्त्रार्थशास्त्रयोः

अर्थशास्त्रोक्तमुत्सृज्य धर्मशास्त्रोक्तमाचरेत् ।

The term Artha Shastra has been used in the sense of 'rules of relief' which ultimately means 'rules of equitable relief.' The considerations of relief to be granted are matters of equity and are usually known as Laukika Shastra (popular principle) or as Laukika Nyayas (popular maxims).

Vrihaspati says: Decision should not be based only on the Shastras. By an unreasonable judgment there is loss of Dharma."

केवलं शास्त्रमाश्रित्य न कर्तव्यो हि निर्णयः ।

युक्तिहीने विचारे तु धर्महानिः प्रजायते ।

It contemplates Shastras which are of the nature of quasi-law or doubtful meaning but not positive commands which permit of no ambiguity. Jaimini also holds that when a Shastra is of a doubtful character, it must be interpreted in the light of reason.

Then as regards conflict between the Smṛiti texts themselves, several principles have been suggested; Yajñavalkya (II. 21) says: "When two Smṛitis differ, that which follows equity as practised by the people of old, should prevail. स्मृत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः ।

Narada says: "In cases of conflict of Smṛitis, decision should be based on reason (as embodied in custom; as custom is powerful and overrides the sacred law."

धर्मशास्त्रविरोधे तु युक्तियुक्तो विधिः स्मृतः ।

व्यवहारो हि बलवान् धर्मस्ते नावहीयते ॥

Vrihaspati says :

"The first rank (among legislators) belongs to Manu because he had embodied the essence of the Vedas in his work, that Smṛiti (or text of law) which is opposed to the tenor of the laws of Manu is not approved."

वेदार्थोपनिबन्धत्वात् प्रधान्यं हि मनोः स्मृतम् ।

मन्वर्थविपरीता या सा स्मृतिः न प्रशस्यते ॥

The superiority of Manu's Smṛiti is due to the fact that it is the oldest. But time does introduce change. This is evident from the text of Parasara : 'The law of Manu is authoritative in the *Satya Yuga*, the law of *Gautama* in the *Treta*, in the *Dwapara Sankha Likhita*, and in the *Kali* the law of *Parasara*."

कृते तु मानवा धर्मास्त्रेतायां गौतमाः स्मृताः ।

द्वापरे शङ्खलिखिताः कलौ पाराशरा स्मृताः ॥

Sri Bhatta Sankara in his learned treatise—*Mimansa Bala Prakasha* treats the subject *Kalpa Vidhis* (constructive *Vidhis*) in detail. They are nothing but *Vidhis* presumed by reason. They have been first divided into *Kalpya Vidhis* proper and *Kalpya Nishedha*, then he divides the latter into seven classes such as, *Achara Kalpya* and *Arthavada Kalpya*, etc. *Kalpya Pratishedha* can be illustrated by the text : "Let not persons of the same *Gotra* be married." This rule is not to be found in any express text but is an extension of a principle contained in certain texts." The prohibition of *Parana* (breaking fast) at the time of *Hari vasara* is an instance of *Achara Kalpya Pratishedha*.

The digest writers in reconciling conflicting texts generally make use of equitable and reasonable considerations and often arrive at a conclusion in the nature of a compromise, in the shape of constructive *Vidhi*. For example, the *Mitakshara* deduces the rule that a widow inherits her husband's property, provided he was not living jointly with his brothers at the time of his death, from a number of texts some of which clearly asserted the widow's right of succession unconditionally; some virtually negative her right altogether; while a few indicate that she is to succeed after her husband's brothers. The *Dayabhaga* tries to reconcile the texts to a great extent by appealing to *Shastric* reason and sense, and practically adopts those texts which coincide with reason. It does not at the same time discard unceremoniously the texts which contradict those approved by it. A particular reading of these has been suggested with some grammatical liberty of construction. Manu shows that the word 'his,' i. e., 'husband' is understood before 'entire share' and refutes the compromise arrived at by the *Mitakshara*, that the widow takes only if her husband was not joint with his brothers (a).

SECTION 5. POPULAR MAXIMS

Jaimini's maxims of interpretation are of a great binding force. Certain principles of interpretation of common knowledge or the popular maxims (*Laukika Nyayas*) are not of the same authoritative force but many of them are quite authentic. These maxims are nothing but expressions of common sense which may be correctly termed as "*the condensed good sense of the nation.*" The origin of these *Laukika Nyayas* which are abundantly found in the ancient and modern Sanskrit literature can be traced to various sources. They are often found in the striking passages of some ancient poets, e.g., the *Panka-prakshalana* maxim पङ्क प्रक्षालन न्यायः—'Better to avoid the mud than to wash it off.' Some of them originated from popular stories while in other cases the details of the story giving rise to them, cannot be traced with certainty. Some of them are based on facts, real or supposed, e.g., the maxims of the Lion's look सिंहावलोक न्यायः and the crow's eyeball काकाक्षि गोलक न्यायः. Others show the sympathies and antipathies of the people of the time, and not a few of them are expressions of ironical sarcasm. Only some of them which have some bearing on legal principles will be of help to us. No systematic treatise on these has been prepared except that of 'Laukika Nyaya Ratnakara' along with its abridgement 'Laukika Nyaya.' These books give no references. Colonel G. A. Jacob has done really useful work in connection with this subject and has published them in two booklets (*Laukika Nyayanjali* or the Handful of Popular Maxims). Popular maxims which are in the form of abstract propositions are thus the condensed expressions of some natural or moral facts or laws embodied in sayings which were prevalent among the people concerned. But mostly they are found in the form of facts or as an illustration of some kind of expediency. Some of the popular maxims as collected and given by the learned Tagore Law Professor K. L. Sarkar (p. 354) are given below :

Class IV

71. सकृत् कृते कृतः शास्त्रार्थः The maxim that *if a thing is once done, the requirement of Shashtra in that respect is fulfilled.* It is a generalisation of Jaimini's maxims regarding Tantra and Prasanga and is of very great practical importance in applying the texts of the Shashtra. It is very frequently referred to in the works of commentators on the Smritis.

72. सकृदुच्चरितः शब्दः सकृदेवार्थं गमयति । In the same passage a word occurring once cannot be taken both in its primary and secondary sense. The Dayabhaga has referred to it in several places

and this maxim also is of vital importance to the interpretation of law.

73. शब्दाधिक्यादर्थधिक्यम् । *More words, more meaning.* Kashiram in his commentary on Shuddhitattva and Raghunandana in Udvahatattva have made use of this maxim, which is the keynote of the principle of literal construction.

74. यावद्वचनं वाचनिकं । The maxim of *understanding up to the limit of the power of an expression*. The principle of literal construction has been emphasised by this maxim by the assertion that one cannot go beyond the power of words. It occurs twice in Bhamati, pp. 710, 742. Anandagiri also quotes it in his comment on IV. iii. 4.

75. शते पञ्चाशत् । The maxim of *fifty in a hundred; the greater includes the less* [See Savara VI. i. 43]. It is equivalent to the Latin maxim *maius magis continet in se minus*. This maxim appears to be a provoking truism and it has been so put in this form to make it more attractive.

76. यः कारयति सकरोत्येव । The maxim that *causing (a thing) to be done is to do (it)*. It means that he who causes a thing to be done by another is the real doer of it. Its equivalent Latin maxim is "*Qui facit per alium facit per se*" Anandagiri has made use of this maxim on Brahmasutra Bhashya I. 2. 21.

77. रुढिर्योगमपहरति । The maxim that *current sense steals away that which is derived from the root*; or, in the words of Jacob: "*Popular usage overpowers etymological meaning.*" This maxim is included in Jaimini's *Padartha Prabala* maxim and has been referred to in various places such as *Vivaranaprimeyasangraha* (1. 3. pp. 134, 135), *Panchapadikavivarana* (pp. 132-3), *Vedantakalpataru* (p. 207, and Anandagiri on Brahmasutra Bhashya (1. 3. 42). Its Latin equivalent is "*Optimus interpret usus*"—Usage is the best interpreter of things. This Roman counterpart is well familiar to the lawyers.

78. एकविनी प्रतिज्ञाहि प्रतिज्ञातं न साधयेत् । *Definition alone is no proof*. It means that bare assertion of a matter is no proof of the matter asserted. This is found in *Sarvadarshanasangraha*. It is an universal maxim.

79. सम्भवत्येकवाक्यत्वे वाक्यभेदो न चेष्ट्यते इति न्यायः । *Do not make two sentences or ideas, when one is possible*. It shows how popular maxim agrees with Jaimini's maxim.

80. कांस्यभोजी न्यायः । The maxim of *eating from the brazen vessel*. Jaimini refers this maxim in XII. ii. 35 where he says: ' It

there be several conditions not inconsistent with each other, then (the condition) should be adjusted so as not to interfere with the condition attaching to the inferior in position, just as in the case of the eating from the brazen plate. This maxim 'eating from the brazen plate' is explained by Savara as meaning that, where there are the student and the teacher to take food, the former with a pre-existing vow to take his food from brazen plates only, then the latter, for the leavings of food the student is bound to partake, must accommodate the student by taking his food served in a brazen plate even though it may not be quite convenient to him. The importance of this maxim appears to be that where it is possible, inconsistencies should be reconciled.

81. **देहलीदीप न्यायः** The maxim of *the lamp on the threshold*. A lamp so placed gives light both inside and outside the house; and the maxim is applied to something which fulfils a two-fold purpose, Savara in his Bhashya on Jaimini XIII. I 3 makes use of this Nyaya, though he does not actually mention the word *Dehalee*.

82. **फलवत् सन्निधावफलं तदङ्गम्** । The maxim of *the resultless being subordinate to that which has a result* The principle that whatever has no result of its own, but is mentioned in connection with something else which has such a result, is subordinate to the latter. This is Dr. Thibaut's rendering of the Nyaya as it occurs in Brahmasutra-bhashya II. i. 14 (p 443), and he explains it in a foot-note as follows :

"A Mimamsa principle, a sacrificial act, for instance, is independent when a special result is assigned to it by the sacred texts; an act which is enjoined without such a specification is merely auxiliary to another act." (See also Savara IV. iv. 19)

83. **ब्राह्मण परित्राजक न्यायः** The maxim of *the Brahmana and the holy traveller*. In such a sentence as, 'the feasting of the Brahmanas and holy travellers,' the separate mention of the latter who are really included in the former term, merely emphasises their position as a special section of the general body. It also appears in Kumarila Bhatta's Tantravartika pp. 423, 590.

84. **काकवन्त परीक्षा न्यायः** । The maxim of *the examination of a crow's teeth*. It applies to any useless and manifestly fruitless enquiry. It occurs in Sankara's Bhashya on Katha Upanishada I. 25. It is also found in Jaiminiya Nyayamalavistara 4. I. 1.

85. **गोवलीवर्ह न्यायः** । The maxim of *the cattle and the bull*. It is to the same effect as the maxim of the Brahmana and the holy traveller. It means that where two words are joined together meaning

almost the same thing, the second word is intended to emphasise the meaning of the first. Kulluka refers to this maxim in his exposition of Manu VIII. 28, where six classes of women are enumerated as having a claim to the King's protection. **अत्र चानेकशब्दोपादाने गोवलीवर्द्धन्यायेन पुनरुक्तिपरिहारः ।**

86. **नष्टाश्वदग्धरथन्यायः** The maxim of the *lost horses and burnt chariot*. It is based on the story of two men travelling in their respective chariots, and one of them losing his horses and the other having his chariot burnt, through the outbreak of a fire in the village in which they were putting up for the night; the horses that were left, were harnessed to the remaining chariot and the two men pursued their journey together. Its teaching is *union for mutual advantage*. This very old story is referred to in Kumarila Bhatta's *Tantravartika* pp. 15, 709, 832.

87. **सुन्दोपसुन्द न्यायः** The maxim of the *two monsters*. It implies that where two contradictory facts are equally strong, they neutralise one another. In this sense it has been applied in Sankhya Tattwa Kaumudi. Raghunath asserts that this maxim would apply when the things in opposition are of equal strength, but when they are of unequal strength and the weaker is to go to the wall, then the Matsya Nyaya is employed. The story of two monster brothers, Sunda and Upasunda who, quarrelling over the heavenly woman Tilottama, destroyed each other, gives this maxim its name. Its Latin equivalent is, *Allegans contraria non est antientius*. He is not to be heard who alleges things contradictory to each other.

88. **मत्स्य न्यायः** The maxim of the *larger fish eating the smaller*. It means the weaker goes to the wall, just as the large fish eats the small. Kulluka, in his commentary Manu Saṁhita on Manu VII. 20 **अत्र बलवन्तः दुर्बलान् हिंस्युरिति मत्स्य न्यायः एवस्यादित्युक्तम्** has made use of this maxim.

89. **न यद्विरिभृङ्गमाखण्ड्यते तदप्रत्यक्षम्** The maxim that *a thing is not to be taken as imperceptible because it is perceived with great difficulty*. It is referred to in *Tantravartika* p. 6 and in *Nyayamanjari* p. 422.

90. **यवश्चेन हृतपुरा तत्पश्चात् गर्हभः प्रान्तं केतोपायेन शक्नुयात्** The maxim that *one riding on a horse cannot be overtaken by one riding on an ass*. Kumarila Bhatta refers it to ridicule the claims of those resting on the authority of the Smṛiti to match those who are grounded on the authority of the Śruti [*Tantravartika* p. 730, and *Nyayamanjari* p. 262].

91. **ऊर्जजीव्यविरोधस्यायुक्तत्वम्** Do not strike at your own existence. Its true significance is : it is wrong to quarrel with that on

which one's livelihood depends. It is found in Paribhashendushekhara p. 85 which employs it to support the proposition that when one relies on a combination of two things as constituting ground in his favour, he cannot at the same time shut out a rule arising from that combination which will go against the ground taken by him.

92. **अर्कमधु न्यायः** । *Go not far if you find it at your hand.* This maxim says, "If you can find honey in the Arka plant which grows in your yard, no need of going into the mountains in quest of the bee-hives" It has been referred to by Savara in his commentary on Jaimini I. ii. 4 which has been quoted by Vachaspati Misra in Sankhyatattva Kaumudi and by Sankara in his commentary on Vedanta Sutra III. iv. 3.

93. **ऋजुमार्गेण सिध्यतोऽर्थस्य वक्रेण साधनयोग न्यायः** । *When an object can be attained by following a straight path, what is the good of following a circuitous course?* Vachaspati Misra in his Nyayavartika-tatparyatika has used this maxim twice.

94. **आम्रवण न्यायः** । The maxim of *the mangotope* or the maxim —*what predominates, gives the name.*

A mango-tope means a grove in which mango trees abound, not that no other trees are to be found in it. This maxim finds an expression in Jaimini III. iii. 10 which means, in the case of Srutis, that which abounds, in a certain Veda is taken as belonging to that Veda.

95. **एकमनुसन्धित् सतोऽपरं प्रच्यवते इति न्यायः** । *Join at one end, break at the other.* It means a case in which one cannot rely upon an argument without raising an equally strong objection. It has been used twice in Sarvadarsana samgraha.

96. **करकण न्यायः** । The maxim of *wristlet of the wrist*. It means that when a term by itself implies its relation to a certain thing, additional employment of the name of that thing must have some additional meaning; as for instance, the expression, the wristlet of the wrist, means that the person is actually wearing it upon his wrist. Karika expresses it generically **शब्दाधिक्यात् अर्थाधिक्यम्** *Shabdhadhikyat Arthadhikyam*.

97. **काकदभ्युपघातक न्यायः** । The maxim of *the cow and the curdled milk*. It means that looking to the purpose of a proposition, it must be taken in a general sense though expressed in particular words. It corresponds to Jaimini's Grahaikattva Nyaya.

98. **कैमुतिक न्यायः** । The maxim of *what after*. It means that when

the more difficult of the two propositions is proved, the simpler one is to be taken as proved. The maxim of the loaf and the staff is to the same effect. The commentators of the Mimamsa Sūtras discuss this maxim in I. i. 32.

99. जलानयन न्यायः । The maxim of *fetching water*. It implies that when a principal purpose is expressed, all its subordinate incidents are included therein, just as when one says 'Fetch me water for drink,' it means 'Fetch for me a glass or other suitable vessel filled with water.' It corresponds to the Prasanga Nyaya of Mimamsa.

100. दण्डापूप न्यायः । The maxim of *the staff and the cake*. It arose thus : a cake was placed upon a staff and left at the corner of a house. In the morning, the cake was missing, and it was found that parts of the staff had been bitten off, evidently by a rat. Under these circumstances, it must be presumed that the rat who bit off parts of the staff must have eaten up the cake. Jimutavahana has applied it in several places.

101. पङ्कप्रक्षालन न्यायः । *Prevention is better than cure*. Literally it means 'better not to touch the mud than to wash it off.' This maxim has been used in the Dayabhaga, Brahmasutra, Sankara Bhasya, Panchatantra and Mahabharata.

102. नहि दृष्टे अनुपपन्न नाम इति न्यायः । *Where the reason of a thing is found by perception, it is not proper to seek for any other proof for it*. It is on this basis that Jaimini regards the Mantas to be mere Niyamas regarding tangible objects.

103. ब्राह्मणश्रमण न्यायः । The maxim of the *Brahmin Bandhu ascetic*. It implies that where a person is converted from one creed to another, but continues to retain the denomination of his former creed, such an expression should be used. It is quite clear that according to Hindu Law, conversion to Buddhism did not cause a forfeiture of the rights of a Brahmin as a citizen. As regards civil rights, no such forfeiture was caused [Abraham v. Abraham]. It is used by the authors of Kavya Prakasha and the Sahitya Darpana.

104. यत्परशब्दः स शब्दार्थः इति न्यायः । The maxim that *a word signifies the thing signified*. It means that the meaning of a word partakes of the character of the thing to represent which it is employed. In its wider sense it means that a work is authoritative on the subject it purports to treat, and not on any collateral subject. The instance, given by Vijnanbhikshu is, that Sankhya Sūtras, the object of which is to show the means of relieving misery, have no authority regarding the subject of the Supreme Being.

105. यत्रोभयः समोदोषः न तत्रैकोऽनुयोज्य इति न्यायः । *Where both the opposing sides are equally objectionable or equally blameless, the go-by should be given to both of them.* In Mimamsa where two Vidhis happen to be in conflict, there must be Vikalpa or option. The utility of this maxim is not so great in the Mimamsa Darshana as in the Vedanta Darshana, for in the former the object is decision, in the latter elimination.

106. शङ्खवेला न्यायः । *The maxim of the conchshell and the hour of the day.* This maxim is of equal importance to the subject of interpretation as to that of logical argument. Jaimini's principle of Krama (order of sequence) corresponds with this maxim. Raghunandana's application in Malamasatattwa illustrates its exegetic value. The meaning of the expression 'conch-shell and the hours of the day' is that, as the conch-shell is blown according to custom at certain hours of the day, these hours are indicated by the blowing of the conch-shell.

107. शिरीवेष्टनेन नासिकास्पर्श इति न्यायः । *The maxim of showing the nose by moving the hand round the back part of the head.* It implies that when an easy word and direct course are available, an indirect and far-fetched course should not be adopted. It corresponds to Arkamadhya Naya.

108. सन्नहितादपि व्यवहितं साकाङ्क्षं वलीय इति न्यायः । *Nearness of position is not nearness in sense.* This maxim signifies that it is not juxtaposition which determines the nearness of relation of clauses. Clauses though distantly situated may yet be connected by one verging to the other. This Naiyāik maxim is identical with the Mimamsa maxim on the subject.

109. सन्नहितं बुद्धिरन्तरङ्गमिति न्यायः । *The maxim of 'nearer the better.'* It means where a construction with a nearer clause is as good as with a more distant clause, the nearer one should be preferred.

110. समूहावलम्बन न्यायः । *Take all of a group on an equal footing.* It means that when two or more substantives occur together, such as Ghatpata (the cup and the portrait), घटपट न्यायः one should not be taken as qualifying the other, but both as independent substantives. By this maxim it is directed to construe a compound word, as Dandwasamasa द्वन्द्व समासः where this is possible, rather than to construe it as any other Samasa.

111. सर्वविशेषेण साधारण इति न्यायः । *The maxim that which forms the quality of one thing may be the quality of other things.* For

example, Shivetashankha (the white conchshell), but the other things than a conch-shell may also be white. This maxim is practically identical with *Mihaasambandha Nyaya* of the Mimamsa Sūtras.

• 112. सत्त्वपेक्षा न्यायः । *When invited all must be equally attended to.* It means that where to a number of nominative clauses there is one common predicate, that predicate must be applied equally to all the clauses.

113. सावकाशनिरवकाशयोर्मध्ये निरवकाशः बलीयान् इति न्यायः । The maxim that *where there are two Vidhis one of a wide and vague scope, and the other definite and limited, the latter should prevail.* It is similar to Jaimini Samanya Vishesha Nyaya.

114. भूमिरधिक न्यायः । has been mentioned by Savara in VII. ii. 15 and IX. ii. 13

115. शकुनि ग्राहकगति न्यायः । Shakuni-grahakagati Nyaya has been referred to by Savara in IX. i. 22.

116. शुष्केष्ट न्यायः । Shushkesti Nyaya has been mentioned by Savara in IX. ii. 17,

117. अर्द्धजरतीय न्यायः । The maxim of 'half and half.' It arises from the story of the Brahmin who was eulogising his cow offered for sale, as being one of mature age, but who finding that that was not inviting to the purchaser, next day described it as being verily a young animal though old in spirit.

118. कृते कार्ये किं मुहुर्त्तप्रश्नेन इति न्यायः । The maxim *discussing the selection of an auspicious moment after the thing has already been done.*

119. अन्धस्येवान्धलग्नस्य विनिपातः पदे पदे । *If the blind lead the blind, both will fall into the ditch*

120. अजात पुत्रनामोत्कीर्त्तन न्यायः । *Proclaiming the name of a son before he is born.* Its English equivalent is 'counting your chickens before they are hatched.'

121. भिज्जुपादप्रसारण न्यायः । *The beggar planting his footing;* its English equivalent is 'give him an inch, he will take an ell.'

122. स्वाङ्गं स्वव्यधायकं न भवति । *One's own body does not hinder one.* What on the face of it constitutes an accessory to an idea should not be taken to contradict that idea.

123. स्थणानिश्चनन न्यायः । *How to dig earth by a post.* If a position is to be made out circumstantially, you must bring forward

a succession of facts and arguments, as it is only by repeated hammering that one may dig a hole by a post.

124. **स्थालीपुलाक न्यायः ।** *Test one rice in a boiling pot.* Of many things similarly circumstanced, of one and the same description, if one is found to possess a certain quality, the rest may be taken to possess it.

125. **सूचीकटाह न्यायः ।** *Having to deal with the needle and the boiler.* If one is required to solve a simple and a hard question at the same time, let him first despatch the former one.

126. **सिंहावलोकन न्यायः ।** *A lion's glance*—at one glance backward and forward like a lion. It means that when a matter shows itself connected with what precedes and what follows, one must take both into consideration at one glance.

127. **भ्रश्रुर्निगच्छोक्ति न्यायः ।** The mother-in-law who said, "*Be off.*" Abusing another for what one oneself does with a vengeance. The mother-in-law abused her daughter-in-law for refusing to give alms to a mendicant and called him back to tell him, "There are no alms, be off"

128. **शङ्खप्रादिका न्यायः ।** *Seizing oxen by their horns* As a man disables a bull by catching hold of his horns, so if one takes the most seemingly antagonistic passages first and shows that they are antagonistic, then he gains his point easily. For example, in the Vedānta Darshana, Srutis like 'Prana is Brahman', 'Uktha is Brahman' are first examined and interpreted.

129. **शिरश्छेदेऽपि शतं न ददाति विंशतिपञ्चकं तु प्रयच्छतीति शाकटिक न्यायः ।** '*The carter who would be beheaded rather than pay a hundred, but will at once pay five score.*' This means that to many people the thing is not of so much importance as its name and the form in which it is presented. With one name they will accept it, with another name they will reject it.

130. **वृद्धिभिष्टवतो मूलमपि ते नष्टम् ।** *Whilst seeking to obtain interest the creditor loses (that and) the capital too.*

131. **वृद्धकुमारी वाक्य न्यायः** '*The request of the spinster.*' An old spinster asked of Indra to grant the blessing that her son may eat from a metal plate milk, rice and sugar. Thus the old maid by this request asks for a husband, the birth of a son, rice and milch cow etc. This is applied to cases in which a sentence has an involved meaning importing several things.

132. **विष्कृमि न्यायः ।** '*Worms thriving in poison.*' It is equivalent

to 'what is one man's food is another man's poison.'

133. वरं खांशयिकान्निष्कादसां शयिकःकार्पापणः । *Better is a certain karshapana than an uncertain Nishka.* It corresponds to the saying. 'A bird in the hand is worth two in the bush.'

134. मानाधोना मेयसिद्धिः । *To know the thing to be measured you must know the measure.* It is a principle of practical logic.

135. मध्य दीपिका न्यायः । *The lamp in the centre.* 'The idea of a lamp shedding light on both sides. When a term has a connection both with the preceding and the following clauses after the manner of a lamp placed in the door, then this maxim is applied according to the explanation of Professor Gough.

136. मण्डूक मुति न्यायः । *The maxim of a frog's leap.* It is used by grammarians and others to express the passing from one rule to [another over intervening ones. The St Petersburg Lexicon gives references to its use in the commentary on Panini 1. 4. 47 (in the old Calcutta Edition of 1870), and in the Siddhant-Kaumudi on Panini 5. 1 117.

137. बीजाङ्कुर न्यायः । *The maxim of the seed and the shoot.* 'As the seed produces the shoot, so the latter in turn reproduces the former. Each therefore is a cause and an effect of the other. This maxim is met with very frequently in ancient literature such as in Brahmasutra-bhashya 2. 1. 36.'

138. प्रधान मल्लनिर्वहण न्यायः । *The maxim of the destruction of the chief antagonist.* The principle that when the most formidable enemy has been defeated, the less formidable are also virtually overcome. A reference of this maxim has been made in the Bhashya on Vedant Sutra 1 4. 28.

139. पिष्टपेषण न्यायः । *The maxim of the grinding of that which is already ground.* It implies fruitless reiteration, and unproductive repetition. A reference of it has been made in Sankara's Bhashya on Kena Upanishad 32.

140. पाटच्छत्रुतिष्ठते वेश्मनि यामिक जागरणम् । *The vigilance of the watchman after the house has been plundered by thieves.* It occurs in Khandanakhandakhadya p. 45. Its English equivalent is "shutting the stable door after the horse is gone."

141. बटुकुटीप्रभात न्यायः । *The maxim of daybreak in the vicinity of the toll collector's hut.* 'A man, anxious to avoid paying toll, takes another road, but losing his way in the dark, finds himself at daybreak, in the vicinity of that very toll-gate. The saying is employed to illustrate *Uddeshyasiddhi* उद्देश्यसिद्धि as Professor Cowel puts it, that is,

failure to achieve a desired object. It occurs in the Panini section of Sarvadarsanasangraha.

142. गगनरोमन्य न्यायः । The maxim of *ruminating on ether*. It is equivalent to *beating the air*. It has been mentioned twice in the Sarvadarsanasangraha

143. कूपमण्डूक न्यायः । The maxim of *a frog in a well*. It is applied to an inexperienced person brought up in the narrow circle of home, and ignorant of public life and mankind in general.

144. काशकुशावलम्बन न्यायः । The maxim of *catching at straws*. It implies to one being driven to an argument or position wholly untenable. Professor Cowell has rendered it 'like a drowning man's catching at straws.'

145. काकाक्षिगोलक न्यायः । 'The maxim of *the crow's eye-ball*. Crows are popularly supposed to have only one eye, which, as occasion requires, moves from the cavity on one side to that on the other. The maxim is used in respect of a word which appears only once in a sentence but which applies to two portions of it ; or to persons or things fulfilling a double purpose.

146. काकतालीय न्यायः । 'The maxim of *the crow and the palmyra fruit*. A crow alighted on a palmyra tree, and at the same moment some of the fruit fell on its head and killed it. The maxim, is therefore, used to illustrate a startling and purely accidental occurrence.'

147. आकाशमुष्टिहनन न्यायः । 'The maxim of *striking the sky with one's fist*. A vain attempt at an impossibility. It occurs in Sarvadarsanasangraha of Jaimini.

148. अन्नमखेण शान्यति । 'A weapon is silenced by a weapon. Its equivalent is 'Like cures like' or 'set a thief to catch a thief.' It occurs in Jnanottama's commentary on Suresvaras's Naishakar-myasiddhi I. 81.

149. अजाकृपाणीय न्यायः । The maxim of *the she-goat and the sword*. It is founded on the story of a goat having been suddenly killed by accidental contact with a sword, and is used to illustrate any surprising event happening altogether by chance.

150. अवयवशक्तेः समुदायशक्तिर्वलीयसी । The strength of community is greater than of a member of it. Its equivalent is 'Union is strength.' It occurs in Kavyapradipa p. 388.

151. अर्थो समर्थो विधानाधिक्रियते । He has the right who has the want, the power, and the wit. Sarvadarsanasangraha of Jaimini referred to this maxim. Professor Cowell translated it thus:—

"According to the old rules, he has the right who has the want, the power, and the wit,—those who are aiming to understand certain things, as the new and full-moon sacrifices, use their daily reading to learn the truth about them."

152. **वश्यघातमारन्यायः।** The maxim of *the destroyer and its prey*. It occurs in Taittiriya-Vartika 2. 1. 66. (p. 53)

153. **करविन्यस्यवित्वन्यायः।** The maxim of *the wood apple on the [open palm of the] hand*. It is said of something unmistakably clear. 'As plain as a pike-staff.' It occurs in Vartika 1. i. 95.

A reference to the *Mimansa Pramanas i.e., means of proof in connection with these popular maxims would aptly show their character and rationale. The Mimansa philosophy recognises the following seven Pramanas :*

- (1) शब्दः *Shabda*—Revelation
- (2) प्रत्यक्षः *Pratyakshya*—Direct sensual perception.
- (3) अनुमानः *Anumana*—Inference.
- (4) उपमानः *Upamana*—Illustration by simile.
- (5) अर्थापत्तिः *Arthapatti*—Irresistible conclusion of truth from a combination of facts.
- (6) शिष्टाचारः *Shishtachara*—Conduct of wise men.
- (7) अभावः *Abhava*—*Reductio ad absurdum*.

One school recognises only six. Some of these apply to the subject of interpretation. The first one—*Shabda Pramana*—is similar to the *Sruti* principle where the text itself has a clear intention and purpose; where they are to be made by inference or by analogy it would be the case of *Anumana* or *Upamana*. The popular maxims are their illustrations. They bear upon the subject of interpretation by inferential reasoning, and by analogical process. Kumarila Bhatta explains exhaustively the method followed in these two processes.

EXPLANATORY REMARKS ON THE ABOVE POPULAR MAXIMS

"The first nine maxims (Nos. 71 to 79) given before are all in the nature of abstract propositions and are of a technical nature, directly bearing on the subject of judicial interpretation. They are of the same nature as the general maxims of the Roman Law, mostly you will find them in the corresponding maxims of the Jaimini Sūtras." (x)

The other maxims such as Nos. 82, 89, 102, 104, 105, 108, 123 etc., are of general abstract propositions. Other maxims are based on considerations of expediency, which remove the difficulty of an interpreter and show him the course which is expedient. The maxims

Nos. 92 and 107 illustrate this point and suggest that the shorter course should be preferred to the longer one. Such maxims give directions to the interpreter in cases of knotty points found in a text.

Another class or the third class of maxims serve to clear up the meaning of a text by showing its analogy to some particular trenchant facts or to some striking truth. They are practically in the form of similies (*Upama*). The following maxims illustrate the point in question :

The maxim (No. 80) 'Eating from the brazen vessel' occurs in the chapters of Tantrata in relation to the question whether where there is a primary duty, and also a derivative duty, both having the same purpose, the derivative should be ignored. The answer is in the negative and both the duties having equal claims, there is no conflict between them.

The maxims Nos. 81, 88, 94, 96, 97, 100 are all maxims of this class and are of a peculiar character. The maxim (No. 81) of the 'lamp on the threshold' should be considered in connection with the non-splitting of a sentence into two propositions. The latter favours construction by which one thing is to be taken as intended at a time ; the former favours a double purpose; but the two are not contradictory. A proposition or a sentence may have one idea in the main but it may be construed to serve a double purpose. As regards the maxim (No. 88) of 'the larger fish eating the smaller,' in case of a conflict between a principal proposition and a subordinate proposition, the latter is to be ignored. The '*Samanya Vishesh*'—the general and the particular—the particular supersedes the general. Thus on comparison there is no inconsistency between the two maxims as in the latter both propositions are in the affirmative while in the former, one is affirmative and the other is negative. The *Mango-top*e maxim is similar in effect to the Pranabritha maxim. The maxim of '*the crow and the curdled milk*' and that of '*fetching water*' are analogous, but not identical. In the former a narrow expression is to be taken in a comprehensive sense, while in the latter when there is an indication of a purpose, all its incidents are to be implied. There are some points of resemblance in the maxims—'*the wristlet of the the wrist*,' '*the Brahmin and the holy traveller*.' In the former the word wrist seems to be superfluous but in order to give it a meaning, it is to be taken as indicating that the ornament of the wrist is actually being worn on the wrist. In the second maxim, the latter word includes the former and its use is supported for emphasising the same sense. This maxim is identical with the one named '*the cattle and the bull*.' The maxims of the '*staff and the cake*' and of Kaimutika (*what after*) are quite similar as

both show that one thing being established, another is established *a priori*.

SECTION 6. MISCELLANEOUS MAXIMS

Class V. Group A

154. The maxims regarding *the necessity of qualifications* :

**Maxims as to
personal compe-
tency.**

"There must be rules of qualifications as indicated by the nature of a complete act." [Jaimini VI. i. 5]

कर्तुर्वाश्रुतियोगात् विधिः कात्स्न्येन गम्यते "The qualifications for any special class of acts are generally determined in three ways; by texts of general competency, prohibitory Vidhi texts, or by specific mention." [Tithitattwa p. 98]

त्रिधैवहायते वार्त्ता विशेषेण प्रतिक्रियम् ।

योगत्वं प्रतिषिद्धत्वं विशेषेण पदान्वयैः ॥

General competency is indicated by the text: "Duties must be done by those who are pure and living at the time" [Tithitattwa p. 22]

शुची तत्काल जीवी कर्मकुर्वात् । Living at the time is not alone sufficient, He must have the capacity to understand the nature of the business. "That also which a seemingly independent person does but who has lost control over his action, is declared an invalid transaction, on account of his want of real independence." [Narada]

स्वतन्त्रोऽपि हि यत्कार्यं कुर्यादप्रकृतिं गतः ।

तदप्यकृतमेव स्यादस्वातन्त्रस्य हेतुतः ॥

155. The maxims as regards the *competency of women* :

"In the opinion of Badarayana, all without any distinction (who desire heaven) can perform sacrifices. A woman, therefore, is included, because the whole mankind without any distinction is included." [Jaimini VI. i. 8]

जातिं तु वादरायणोऽविशेषात् तस्मात् स्त्रियपि ।

प्रतीयेत जात्यर्थस्याविशिष्टत्वात् ॥

"In fact, in the case of married people, the husband and wife must join in sacrifice" [Jaimini VI. i. 4]

यागे दम्पत्योः सहाधिकाराधिकरणम् ।

As regards establishing the sacred fire, the husband is a necessary party.

"Qualification is recognised ; therefore the dual number (is made up) by a wife." [Jaimini VI. i. 23]

शुणस्य तु विधानत्वात् पत्न्या द्वितीयशब्दः स्यात् ।

156. The maxim that *poverty is not a disqualification* :

"Not so, because (wealth is) unstable, (that is, one may possess

it or not) ; necessarily it may be acquired." [Jaimini VI. i. 41]

अनित्यत्वात् तु नैव स्यादर्थोऽपि द्रव्य संयोगः ।

157. The maxim that *loss of any limb is not a disqualification* :

"Again, the maimed (has) that quality (of competency to sacrifice)." [Jaimini VI. i. 41] अङ्गहीनश्च तद्धर्मा "but persons suffering from incurable diseases cannot perform a sacrifice." [Jaimini VI. i. 10]

अचिकित्स्याङ्ग वैकल्यस्य यागानधिकाराधिकरणम् ।

Class V. Group B

Maxims relating to *the conditions which the performers or doers of an act must observe* :

158. "If an act which is originally optional be commenced it must be completed in accordance with the prescribed rules." [Jaimini VI. ii. 3.]

आरब्धकास्यकर्मणोऽपि समाप्ति नियमाधिकरणम् ।

159. "Such parts of a permanently enjoined act as are essential, are alone to be performed." [Jaimini VI. iii. 1.]

अथ नित्ये यथाशक्ति अङ्गानुष्ठानाधिकरणम् ।

160. "A material may be substituted for a material which is spoilt and has become useless." [Jaimini VI. iii. 4.]

द्रव्यापचारे प्रतिनिधिना समापनाधिकरणम् ।

The substitution takes place, because the performance of an obligatory act is a general duty." [Jaimini VI. iii. 15.]

आगमो वा चोदनायाविशेषात् ।

161. "None can be substituted in the place of the sacrificer himself." [Jaimini VI. iii. 7.]

स्वामिनः प्रतिनिध्यभावाधिकरणम् ।

162. "The principal material should be used even if a substituted be better and more useful" [Jaimini VI. iii. 18.]

सत्यपि संस्कार योग्येऽमुख्ये मुख्यस्यैवोपादानाभाधिकरणम् ।

163. "Even a principal material should be given up and a substitute made for it, if it conflict with the purpose of the act." [Jaimini VI. iii. 19.]

प्रयोजनायोगस्य मुख्यस्य सत्वेऽपि प्रतिनिध्यादानाधिकरणम् ।

164. "Every one contributing to a sacrificial act obtains the whole benefit of the sacrifice." [Jaimini VI. vi. 1]

सत्रे समान कल्पानां सहाधिकाराधिकरणम् ।

Class V. Group C

Maxims regarding *the ownership of property* :

165. "The disposing power belongs only to the owner." "Of that only, one has the disposing power of which one is the owner, other things not being within his competency." [Jaimini VI. vii 2]

'The commentators take this Adhikarana as showing that a man cannot give away his presents in fulfilling his vow of giving away all his property. But this maxim is of a comprehensive character and indicates the essence of the proprietary right. It also indicates the conditions of owning a thing, inasmuch as it shows that in order to own a thing, there must be a person who can exercise disposing power over it. Hence the following principles have been deduced from the above by later writers.'

**Five principles
regarding pro-
perty.**

- (1) Property can never be in abeyance.
- (2) Property must vest in some person, real or ideal.
- (3) Ownership is extinguished by sale, gift, death, degradation and change of religious order.
- (4) Property is for enjoyment and for performance of acts of religious merits.
- (5) Every one is capable of acquiring or holding merits.

The latter rule is also directly supported by the Jaimini Sutra 41 Chap. 1. Book VI.

The principle that succession can never remain in abeyance is not founded upon any special text, but it is a logical deduction from the conception of succession.

According to Hindu Law title by succession arises, without any reference to the volition of any individual, by the operation of a rule of law, and since this rule comes into operation at once on the extinction of the previous ownership, it follows that there cannot be any interval between extinction of interest of the predecessor and the accrual of the interest of the successor for were it otherwise then during the interval the property would be reduced to a condition of a *res nullius*. In this respect, therefore, it differs from the Roman Law according to which acceptance of the inheritance by the heirs except in the case of those who were *sui juris*, was a condition of the estate being vested in him. This was known as "heirs-necessaries". The result of this was, as Sir William Mackby points out, that there was a space of time, very often a considerable one, during which, whatever the theory might be, the inheritance did in fact belong to no one. This difficulty was got over partly by the doctrine of "Relation back" as it is called *i.e.*, the heir though he could not be described as an heir before he

accepted yet, when he accepted, he was treated exactly as if he had succeeded immediately on the death of the owner still the difficulty remained as in the interval the inheritance was vacant, and was apt to give rise to practical inconveniences which no law could remedy.

The right of succession under Hindu Law is a right which vests immediately on the death of the owner of the property. It cannot in any circumstance remain in abeyance in expectation of a birth of a preferable heir not conceived at the time of the owner's death. A child who is in the mother's womb at the time of the father's death is in contemplation of law actually existing, and will on his birth divest the estate of person with a title inferior to his own who has taken in the meantime (a). So in certain circumstances will a son who is adopted after the death of the owner. But in no other case will an estate be divested by the subsequent birth of a person who would have been a preferable heir, if he had been alive at the time of the last owner's death. And the rightful heir is the person who is himself the next of kin at that time. No one can claim through or under any other person who has not himself taken nor is he disentitled to inherit because his ancestor could not have claimed. For instance, in certain circumstances, a daughter's son would be heir and would transmit the whole estate to his issue. But if he died before his grandfather his son would never take. So again the son of a leper or a lunatic or of a son who has been disinherited for some lawful cause will inherit though his father could not (b).

166. The maxim that there is no ownership in the King to the soil which constitutes his dominion [Jaimini VI. vii. 2.]

विश्वजिति पृथिव्या अवेयवाधिकरणम् ।

This maxim cannot be better explained than in the language of Nilakantha who says : "It is stated in the sixth book of the Purva Mimansa, that the whole earth cannot be given away by the king of the world; neither the (whole) Mandala (dependency) by the ruler of that dependency. The ownership in each village, field and like of the whole earth, or the dependency belongs solely to the respective Bhaumikas or landlords.

The ruler has only to take the taxes Hence, in what is now technically called a gift of land, a gift of the soil is not accomplished,

(a) Tagore case 9 B L. R. 39.

(b) *Balakrishna v. Savur Bai* 3 Bom. 54.

but only a grant of due allowance (is provided) *etc.*" (c)

Colebrooke's observations on this Adhikarana are as follows :—

"A question of considerable interest, as involving the important one concerning property in the soil of India, is discussed in the sixth lecture. At certain sacrifices, such as that which is called Viswajit, the votary, for whose benefit the ceremony is performed, is enjoined to bestow all his property on the official priests. It is asked whether a paramount sovereign shall give all the land, including pasture ground, highways, and the site of lakes and ponds; a universal monarch, the earth; and a subordinate prince, the entire province over which he rules?" To the question the answer is: "The monarch has not property in the earth, nor the subordinate prince in the land. By conquest kingly power is obtained, and property in houses and fields belonging to the enemy. This maxim of the law, that "the king is lord of all excepting sacerdotal wealth" concerns his authority for correction of the wicked and protection of the good *etc.*" (d)

Besides the miscellaneous maxims mentioned above a few more legal maxims, as gathered from Manu Smṛiti, are given below :

167. "It is for the king to protect the property of barren women deserted by their husbands, or women who are childless and friendless or are widows and diseased." [VIII. 28]

वशाऽपुत्रासु चैवं स्याद्रक्षणं निष्कुलासु च ।

प्रतिव्रतासु च स्त्रीषु विधवास्वानुरासु च ॥

168. "If one enjoy and use the property of another, such as cattle *etc.* as a friend, the owner's right is not lost by such enjoyment and use. But the right is lost when for a period of ten years one enjoys the property of another in his presence and without objection and not as a friend." [VIII. 146.47]

सम्प्रीत्या भुज्यमानानि न पश्यन्ति कदाचन ।

धेनुरुष्ट्रो वह्नश्चो यरुच दम्यः प्रयुज्यते ॥

यत् किञ्चिद्दश वर्षाणि, सन्निधौप्रेक्षते धनी ।

भुज्यमानं परैस्तूष्णीं न स तल्लभ्यते ॥

169. "Use and enjoyment do not destroy the right of the owner when the property is the borderland of land or it belongs to a minor or is placed in the possession of another as a deposit." [VIII. 148]

अजङ्गश्चेदपोगङ्गी, विषये चास्य भुज्यते ।

भग्नं तद्व्यवहारेण भोक्ता तद्व्यग्रमर्हति ।

(c) Vyavahara Mayukha, Mandalik's Ed. pp 34-35.

(d) Colebrooke's Miscellaneous Essays pp. 345-46.

170. "If the interest is monthly and is allowed to accumulate, the creditor is not entitled to recover more than double amount, including interest, and not more than five times, if the thing lent be cattle, crop or wood "

[VIII. 152]

कुसीदवृद्धिर्द्वैगुण्यं नात्येति सकृदाहता ।

धान्ये सदे लवे बाह्ये नातिक्रामति पञ्चताम् ।

171. "Compound interest among other unconscionable stipulations is not allowable by the Shastras "

[VIII. 153]

नातिसांवत्सरि वृद्धिं, न चादृष्टां पुनर्हरेत् ।

चक्रवृद्धिः कालवृद्धिः कारिता कायिका च या ।

172. "Contracts by the drunken, the insane, infants and men past eighty years of age, and contradictory contracts are not valid."

[VIII. 163]

मत्तोन्मत्तास्तर्थाभ्यधीनैर्बालेन स्थविरेण वा ।

असंवद्धकृतश्चैव, व्यवहारो न सिध्यति ॥

173. "A promise to do a thing reduced to writing is not binding if not sanctioned by law."

[VIII. 164]

सत्या न भाषा भवति यद्यपि स्यात् प्रतिष्ठिता ।

वद्विश्वेद्भाष्यते धर्माश्रित्यतात् व्यावहारिकात् ।

174. "The sons are liable to pay the money for security contracted by their father in case of his death but no liability devolves when the security is to produce a person."

[VIII. 165]

दर्शनप्रातिभाष्ये तु विधिः स्यात्पूर्वचोदितः

दानप्रतिभुवि प्रेते दायादानपि दापयेत् ।

175. "Fraud vitiates sale, mortgage and gift."

[VIII. 165]

योगाधमनविक्रीतं योगदानप्रतिग्रहम् ।

यत्र चाप्युपधिं पश्येत् सर्वं विनिवर्तयेत् ।

176. "If a man dies having contracted a debt for the necessities of the family, the family members whether divided or undivided must pay off that debt."

[VIII. 166]

ग्रहीता यदि नष्टः स्यात् कुटुम्बार्थे कृतो व्ययः ।

दातव्यं बान्धवैस्तत् स्यात् प्रविभक्तैरपि स्वतः ॥

177. "If during the absence of the master a servant contracts a debt for the family, the master must pay it"

[VIII. 167]

कुटुम्बार्थेऽभ्यधीनोऽपि व्यवहारं यमाचरेत् ।

स्वदेशे वा विदेशे वा तं ज्यायास्त विचालयेत् ॥

178. "If a transaction is brought about by force for the execution of a document or the like, the transaction is void." [VIII. 168]

बलादत्तं बलाद्भुक्तं बलाद्यच्चापिलेखितं ।

सर्वान् बलकृतानर्थानकृतान् मनुरब्रवीत् ।

Many of the principles given above are deemed as principles of equity under the English Law. These fundamental principles have nothing to do with the law of interpretation, but they are given here to show that the Hindu Law is not wanting in them.

SECTION 7. GENERAL RESEMBLANCE BETWEEN WESTERN AND HINDU LEGAL MAXIMS

It would be profitable to consider the resemblance or otherwise between the two systems—the Hindu and the Western—as regards those formulas of interpretation which are termed maxims.

179. Yajnyavalkya says, "Of all acts—[such as] sacrifices, ceremonial observances, repression of sensual desires, harmlessness, gifts, and the study of the Vedas—this is the best *Dharma* (namely) viewing one's own self as merged in humanity." (a) The sacrifice of individual interests for the sake of public good is the spirit of the Smriti law. It is evidenced by Savara Swami thus, "Tanks should be dug." "Public roads should be constructed." So it is ordained that money is to be spent by individuals for public works and they should suffer inconveniences for the convenience of the public. *Yogakshema* has been explained by the Mitakshara, in the section on impartible properties, to mean works of public utility, by performing which the blessing acquired by pious acts is conserved. A similar English maxim as given by Broom is *Salus Populi suprema Lex* which means that regard for the public welfare is the highest law, or that interest of the individual should be sunk in that of the community.

180. The Mahabharata expounds one's duty in times of calamity in the chapter on *Apadharma*. For example, two persons, being ship-wrecked, are supporting themselves on the same plank. When it is impossible for both of them to be saved, one of them may save himself by throwing the other down; this homicide is excusable through unavoidable necessity.

Smritis also uphold such deviations from ordinary duties in times of calamity. Yajnyavalkya (b) says :

"Having suffered starvation for three days a man may take

a) Institutes of Yajnyavalkya, Acharadhya Ch. 1, sec. 8.

(b) Prayaschittwa Adhyaya sec. 43

the grain of others except that of a Brahmana, but should pay and confess when complained against."

बुभक्षितस्यैहं स्थित्वा धान्यमब्राह्मणादरेत् ।

प्रतिगृह्य तदाख्येयमभियुक्तेन धर्मेतः ॥

There is a similar maxim in Latin : *Necessitas Inducit Privilegium quoad Jura Privata*—With respect to private rights, necessity privileges a person acting under its influence.

181. It is an acknowledged principle that the Smṛiti (common law) must be either actually or constructively derivable from the Vedas, and that our law is religion.

This fundamental principle of Hindu Law has been but faintly expressed in the Western system : *Summa Ratio est quae pro Religione facit*—that rule of conduct is binding which is consistent with religion.

182. The Shāstra-writers have laid down on the basis of the (2) Legislative *Apachheda* maxim that, what follows supersedes policy. what goes before.

पूर्वं परेण । यथा “यद्युद्गताऽपच्छिद्यते अदक्षिणो यज्ञः परिसमाप्यते यत्पूर्वस्मिन्दास्यनुस्यात् तत् दद्यात् । यदि प्रतिहर्ता सर्ववेदसं दद्यादि” ति द्वयोर्निमित्तयोर्द्वे नैमित्तिके विहिते तत्र निमित्तपौर्वापर्ये परेण नैमित्तिकेन पूर्वनैमित्तिकं बाध्यते । [Sree Bhatta Sanker's Mimansa Bala Prakasha p. 181.]

This principle is recognised, though no statute law is contemplated by Hindu Law, and the Smṛitis are presumed to have come into existence simultaneously with the Śruti.

But the necessity of such a principle is very essential in the Western system owing to the existence of the statutory law and the maxim is : *Leges posteriores priores contrarias abrogant*.—When the provisions of a later statute are opposed to those of an earlier, the earlier statute is considered as repealed.

183. *Nova Constitutio futuris Formam imponere debet non praeferitis*.—A legislative enactment ought to be prospective, and not retrospective, in its operation.

“There being no idea of legislation in the Hindu Law, there cannot be any counterpart of this maxim, in its strict form, in the Shāstras. But, as a principle of jurisprudence, it is laid down in the Mimāṃsa Shāstra, that a text which relates to events as a matter of history cannot be regarded as a Vidhi, but is to be taken as a *Bhutarthavada* (recital of what has happened). It is also laid down that the very conception of a Vidhi is what is to be done in the future

(*Apraptaprapaka*), and not what has been an accomplished fact beforehand (*Praptaprapaka*).” (a)

184. *Ad ea quoe frequentius accidunt jura adaptantur*.—The laws are adapted to those cases which most frequently occur.

The counterpart of this maxim cannot be found in the Hindu system owing to the want of the idea of legislation.

But this principle has been given in a general way, specially as regards prohibitory Vidhis, which are directed against wrong acts that the people are usually prone to do.

(3) **The Crown.** 185. *Rex non protest peccare*.—The king can do no wrong.

This principle has not been recognised in Hindu Law as under the Hindu system the king also, like other human beings, can do wrong and by so doing he involves not only himself but his predecessors also in a sin, the punishment of which is everlasting hell, and besides, involves the whole of his kingdom in ruin.

186. *Quando Jus Domini Regis et Subditi concurrunt Jus Regis praeferri debet*.—Where the title of the king and the title of a subject concur, the king's title shall be preferred.

The contrary principle negating the title of the sovereign to the lands of his dominion which are in the occupation of his subjects, has been laid down in the Viswajit Adhikarana, as explained above.

187. *Cessante Ratione Legis cessat ipsa Lex*.—Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself.

(4) **Logic.** This principle coincides with Niyama Vidhis in which out of a number of things which will serve the same purpose, one is selected by law for the carrying out of the purpose, for some special reason. On failure of the special reason, some other things of the class may be substituted for the specially prescribed thing. But the Hindu Law is inflexible as to absolute Vidhis, as explained by the *Hetuvannigad-adhikarana* which treats the statement of reason as a recital and it is of no consequence to the law whether the reason continues or not. The law remains good in spite of the failure of any stated reason for it. It has also been said before that where a rule of law is grounded upon a reason consisting of a corrupt or selfish motive, that rule is not at all to be taken as a law, by the principle laid down in the third Adhikarana-*Drishtamulaka Smritipramanyadhikarana* of Chapter III, Book I (x).

188. *Allegans contraria non est audiendus*.—He is not to be heard who alleges things contradictory to each other.

(a) K. L. Sarkar, *Mīmāṃsā Rules of Interpretation* p. 470.

(x) K. L. Sarkar, *Mīmāṃsā Rules of Interpretation* p. 474.

This principle has been laid down in the maxim of *the two monsters*, as explained above.

189. *Omne majus continet in se minus.*—The greater contains the less. It is similar to the maxim as mentioned before—'*In hundred is fifty.*'

190. *Quod ab initio non valet in Tractu Tempories non convalescit.*—That which was originally void, does not by lapse of time become valid.

Broom (a) explains the application of this principle thus: "In the ordinary case, also, of a will void by reason of its not being duly attested according to the provisions of the statute, or on account of the coverture of the testatrix at the time of making the will, all the dispositions and limitations of property contained therein are also necessarily void, nor can the original defect in the instrument be cured by lapse of time."

This principle has been indirectly given by Yajnyavalkya thus: "If a person whose title is impugned should die, his heir should establish it; in such a case enjoyment without title is no proof." [Vyavahara Chapter, sec. 21]

योऽभियुक्तः परेतः स्यात्तस्य रिक्तो तमुद्धरेत् ।
न तत्र कारणं भुक्तिरागमेन विनाकृता ॥

This principle should be read along with the principle of limitation. It lays down an exception to this rule *vis*, that a person loses his title by adverse possession of 20 years for immovables and 10 years for movables :

पश्यतोऽमुवतो हानिर्भूमेर्विंशति वार्षिकी ।
परेण भुज्यमानाया धनस्य दशवार्षिकी ॥

191. *Argumentum ab inconvenienti plurimum valet in Lege.*—An argument drawn from inconvenience is forcible in law.

The maxim of Hindu Law akin to this is the *Svaru* maxim स्वरोश्चेदनाद्यप्रयोजकताऽधिकरणम् । [Jaimini IV. ii. 1—6]

It means that one construction secured with convenience and economy is preferable to one secured with labour and fruitless trouble.

(5) **Fundamental legal principles.** 192. *Ubi Jus ibi Remedium*—There is no wrong without a remedy.

In the Hindu system, Vyavahara law consists of rules to remedy a wrong done by one man to another. It is evident from the very definition of Vyavahara as given by Yajnavalkya: "If one aggrieved by others in a way contrary to the Smritis and the established usage

complain to the king, that subject is one of the titles of Vyavahara, or a judicial proceeding " स्मृत्याचारव्यपेतेन मार्गेणाधर्षितः परैः आवेदयति चेद्वाङ्मि व्यवहारपदं हि तत् । आधर्षितस्तिरङ्कृतः । (a) Thus for every wrong which can be the subject of litigation the King is enjoined to enforce the law. The rules of Achara Kanda, cognisable by the ecclesiastical courts, *viz.*, the assemblies of priests, prescribe the remedy to be expiation or penance.

193. *In Jure non remota Causa sed proxima spectatur.*—In law the immediate and not the remote cause of any event is regarded.

This principle is, to a certain degree, indicated by those Sutras of Jaimini by which a thing should be taken in its visible and tangible aspect, rather than in any transcendental aspect.

194. *Lex non cogit ad Impossible.*—The law does not seek to compel a man to do that which he cannot possibly perform.

"Under the Mimansa Shastra when a text apparently enjoins something which is impossible, such text is to be read only as figurative in the nature of an Arthavada. For example, the text which refers to the building of the altar on the earth, in the firmament and in the heavens." [Taittiriya Samhita V. 2. 7.] (b).

195. *Ignorantia Facti Excusat.*—*Ignorantia Juris non excusat.*—Ignorance of fact excuses—ignorance of the law does not excuse.

The Hindu system has gone to the extent of holding that even an ignorance of fact is not a complete excuse, and it may be punished with a lesser penalty (c).

196. *Nemo debet bis vexari pro una et eadem Causa.*—It is a rule of law, that a man shall not be twice vexed for one and the same cause.

Yajnyavalkya (Vyavahara Adhyaya, sec. 9) lays down the same principle in these words: "Nor should one already charged be allowed to be charged again."

अभियुक्तं च नान्येन नोक्तम् विप्रकृतिं नयेत् ॥

In Chapter 253 Agni Purana has laid down this principle in the same form where the functions of the courts and the procedure to be followed by them have been explained.

197. *Acta exteriora indicant interiora Secreta*—Acts indicate the intention.

Jaimini [II. i. 1.] has also said the same in his Sutra :

"Words relating to action bear on what passes in consciousness. From them external acts proceed."

आवार्थाः कर्मशब्दाः तेभ्यः क्रिया प्रतीयेत ॥

(a) Chapter, Vyavahara ; sec. 3.

(b) K. L. Sarkar, Mimansa Rules of Interpretation p. 473.

(c) Raghunandana's Prayaschittatattva, sec. 18.

198 *Alineatio Rei Præfertur Juri Accrescendi*—Alienation is

(6) **Transfer of property.** favoured by the law rather than accumulation.

The Hindu system does not agree with this principle; it favours accumulation. The Mitakshara and the Dayabhaga both favour accumulation rather than alienation.

199. *Accessorium Non Ducit Sed Sequitur Suum Principale*.—The incident shall pass by the grant of the principal, but not the principal by the grant of the incident.

This principle has been expressed in different forms in the Mimamsa Shastra. [Jaimini III. iii. 9]: "When a subordinate matter clashes with the principal, the latter is to prevail.

(7) **Law of descent.** 200. *Memo est Hæres Viventis*.—No one can be heir during the lifetime of his ancestor.

This is equally recognised by Hindu Law in case of succession to self-acquired property. So far as joint family property is concerned there is no succession and no application of this rule; in fact the conception of joint family property is peculiar to Hindu Law, more or less akin to corporation.

201. *Hæreditas Nunquam Ascendit*.—The right of inheritance never lineally ascends.

This principle is quite contrary to Hindu Law.

202 *Qui per Alium Facit per Seipsum Facere Videtur*.—He who does an act through the medium of another party is in law considered as doing it himself.

(8) **Law of contract.**

The Hindu Law has this maxim to match the above :—

—"Causing to be done is to do."

यः कारयति सः करोत्येव ।

203. *Vigilantibus, Non Dormientibus, Jura Subveni ent*.—The laws assist those who are vigilant, not those who sleep over their rights.

This is the basis of the law of limitation. Yajnyavalkya (Vyavahara Adhyaya, sec. 24) has spoken of this principle thus: "To him who sees another enjoy his land for twenty or his money for ten years loss [of that thing] occurs" (see the 2nd verse given under maxim 90.)

204. *Ex antecedentibus et consequentibus fit optima Interpretation*.—

(9) **Interpretation.**

A passage will be best interpreted by reference to that which precedes and follows it. It is, however, subject to this limitation. '*A verbis Legis non Est recedendum*'—No interpretation is to be made contrary to the express letter of the statute.

The maxim in the Mimamsa system to this effect is *Ekavakyata maxim* which is guarded against by good many limitations unlike the Roman Law. It is to be read as subject to the principle of *Linga-shabda-samartha* (the vocabular principle) which deals with the latent force of words. When the meaning of a sentence is cleared by examining the meaning of the words it consists of, the Mimansakas would prefer this to that of reading the sentence with what precedes and follows. Therefore, Linga principle has been rightly preferred to Vakya by our Mimansakas.

205. *Absoluta Sententia Non Indiget.*—A positive statement is not in need of any interpreter. This is the Sruti principle of our Mimamsa system.

206. *Sensus Verborum Eex causa dicendi accipiendus est.*—The sense of the words ought to be taken from the cause or occasion of speaking them.

In the Mimamsa system it is equivalent to the Linga principle.

207. *Expressio unius est Exclusio alterius.*—The express mention of one thing implies the inclusion of another.

This resembles the rule of Parisankhya.

208. *Verba relata Hoc maxime operanturs per Referentiam ut in eis inesse videntur.*—Words to which reference is made in an instrument have the same effect and operation, as if, they were inserted in the clause referring to them.

It corresponds with the principle of Atidesha.

209. *Conditio Præcedens adimpori debet prinsquam sequator effectus.*—A condition precedent must be fulfilled before the effect can follow.

It is similar to the Mimamsa principle : " All the Angas (conditions) of a sacrifice must be performed before a sacrificer can reap the fruits of the sacrifice." [Jaimini VII. iii. 4]

210. *Mellius Est Petere fontes quam Sectari rivulos*—It is better to seek the fountains than to follow the rivulets.

It is similar to the maxim : "When an object can be attained by following a straight path, what is the good of following a circuitous course ?" ऋजुमार्गेण सिद्धेऽर्थे वक्रेण साधनायोगः ।

211. *Sic Interpretandum Estut Verba Accipiuntur cum effectu.*—Such an interpretation is to be made that the words may be received with effect.

This principle has been put by the Mimansakas thus : " More words, more meaning." शब्दाधिक्यात् अर्थाधिक्यम् ॥

212. *Optimus Interpres Rerum Usus* — Usage is the best interpreter of things.

This rule in the Hindu system is embodied in the *Padārtha-prabalyadhikarāṇa* maxim of Jaimini [I. iii. 7]: “Without speculations as to causes, usages prevail” अपि वा कारणाप्रहणे प्रयुक्तानि प्रतीयेरन् — with special reference to the Smṛiti and usage law.

The *Grahapatya* Maxim and the *Baṅhi* Maxim correspond to the golden rule laid down by Lord Wensleydale which is as follows :

“The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance or inconsistency, but no further.”

The *Sphadi* Maxim and the *Arūni* Maxim correspond to what Maxwell puts under the head :—Words understood according to the subject-matter.

Maxwell introduces his section on the subject as follows :—

“The words of a statute are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used and the object to be attained.” (a)

Compare this with the above-mentioned *Sphadi* Maxim and *Arūni* Maxim. The former Maxim is introduced by the Sutra :

“A thing which is connected with the performance of an act of duty as means to an end, must be understood in a sense which is suited to the purpose of that act.”

The latter maxim is introduced by the Sutra :

“The purpose being one and the same *vis.*, to promote an action, materials and quantities (thereof) are laid down simply to subserve that action, and not to control it.” (b)

The Three Debt Maxim answers Maxwell's topic :—

Extension of meaning according to the object.

With regard to the above, Maxwell remarks as follows :—

“Even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to it, if fairly susceptible of it. If there are circumstances in the Act showing that words are used in a larger sense than their ordinary meaning, that sense must be given to them.” (c)

(a) Maxwell p. 74. (Third Edition.)

(b) Jaimini III. i. 11.

(c) Maxwell p. 95 (Third Edition).

Compare this with the manner in which the Three Debt Maxim is arrived at.

The *Chitra* Maxim and the *Tad Vyapadesha* Maxim practically run on the same lines as the following topic in Maxwell :—Modification of the language to meet the intention.

The observations of Maxwell under the above head are as follows :—

“Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence (*d*).”

Compare this with the way in which *Chitra* Maxim and the *Tad Vyapadesha* Maxim are settled

The *Khameshti* Maxim and the *Svaru* Maxim as well as the *Tantrata* and *Prasanga* principles amount to presumptions against intending what is inconvenient or unreasonable.

Under the above head Maxwell observes as follows :—

“In determining either what was the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most agreeable to convenience, reason, justice,* and legal principles should, in all cases open to doubt, be presumed to be the true one. An argument drawn from an inconvenience, it has been said, is forcible in law; and no less force is due to any drawn from an absurdity or injustice.” (*e*)

Compare the above with the *Khameshti* Maxim, the *Svaru* Maxim as well as the *Tantra* and *Prasanga* Maxims.

The *Rurhi-yoga* Maxim and *Padartha-prabalya* Maxim correspond to the remarks of Maxwell under the head :—Words construed in popular sense (*f*) and his remarks under the head :—Effect of Usage (*g*).

The *Kalanja* Maxim and the *Paryudasa* Maxim cover Maxwell's, observations under the head of ‘Repugnancy.’ (*h*)

The Maxim of *Arthavada* includes the subject of Recital *etc.*

An *Arthavada* roughly corresponds to a *recital* or *preamble*, as already explained. Jaimini speaks of it as being the *stuti* (that which expresses the merit) of a *Vidhi*. Later writers describe it as showing *Prashastya* (scope) of a *Vidhi*. The object of a preamble or recital is roughly the same. According to English Law mere recital in a statute, either of fact or law, is not conclusive.

(d) Maxwell p. 319 (Third edition).

(f) *Ibid* p. 77.

(g) *Ibid* p. 423.

(e) *Ibid* p. 264.

(h) *Ibid* p. 214.

Compare *Reg. v. Haughton* (i); *Bentley v. Rotherham* (j); *Crowder v. Stewart* (k); with the Mimamsa principle known as Vidhivannigada Maxim and Hetuvannigada Maxim.

The principle laid down in the case of *Reg. v. Bishop of Oxford* (l) has been followed in many cases in this country. It is this:

"A statute ought to be so interpreted that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant."

It has already been shown that this principle is expressed by Hindu writers by the short Maxim—More words, more meaning.

शब्दाधिक्यात् अर्थाधिक्यम् ।

The above instances are sufficient to show that although the method of treatment is somewhat different in the two systems they substantially agree.

There are some popular principles of construction other than maxims treated by certain authors and they deserve consideration. They are given below:—

(1) when in establishing a particular proposition several reasons are successively given in clauses, each preceded by such word as *Kincha*, *Yadva*, *va*, the reason last given is to be accepted as the correct one; the preceding ones would be taken as *obiter dictum* according to modern legal phraseology.

(2) When several alternative propositions are formulated in the same sentence with the word *va* (or) without any indication of a conclusion, it would imply that the author does not approve of any of them.

(3) When two reasons are given in the same clause for any particular proposition, the reason last given is taken as being merely corroborative—*Sadhaka साधक*. Jaimini often uses such words as *Darshanat दर्शनात्*, *Lokavat* (from observation as with worldly people) *लोकवत्* although according to his own philosophy, matters of perception or personal knowledge cannot be relied upon, in discussing what is Vidhi and what is not a Vidhi.

(i) 1. E. and B. 501.

(k) 16 Ch. D. 36

(j) 4 Ch. D. 588, 46 L. J. Ch. 284.

C. L. R. 4 Q. B. D. 261.

CHAPTER V

GENERAL MIMANSA PRINCIPLES REGARDING THE APPLICATION OF TEXTS

Jaimini's work is divided into two equal parts, each half containing six books, called *Shataka*. The first *Shataka* contains the general principles of interpretation and application, *vis.*, the important class of rules, called the *Adhikara Vidhis* (the rules indicating rights, as opposed to rules imposing duties); and also the class of rules, called *Krama Vidhis* (the rules regulating the order in which things are done). The second *Shataka* generally relates to the mode in which the rules of conduct prescribed in connection with one topic are to be applied to the other topics. This half deals with the rules of *Atidesha*, *Uha*, *Badha*, *Tantra* and *Prasanga*.

The general Mimansa principles regarding the application of texts may be treated under the following heads :

I. The principle of distinguishing between obligatory texts on the one hand and quasi-obligatory and non-obligatory texts on the other.

II. . The principle of *Adhikara Vidhis* अधिकारविधि, or principle for ascertaining those to whom the *Vidhi* texts are applicable.

III. The principle of *Krama* क्रम or the principle by which the order in which the texts are to be applied is determined.

IV. The principle of *Atidesha* अतिदेश (rules of reference, general and special) or the principle by which the rules regarding one matter are made to bear on another.

V. The principle of *Uha* ऊहा (adaptation) or the principle by which in the course of effecting an *Atidesha*, necessary modifications are to be made to secure a proper adaptation.

VI. The principle of *Badha* बाधा (bar) or the principle by which in the event of incongruity between one thing and another, either in connection with the application of *Atidesha* or otherwise, a subordinate incongruent matter is barred by the principal.

VII. The rules of *Tantra* तन्त्र (one word expressive of several

meanings) and *Prasanga* प्रसंग (context) both of which provide against the unnecessary repetition of the same act (x).

There is a distinction between the interpretation of texts and their application, though sometimes they are not separable. As, for instance, the interpretation of the phrase '*Dayoh Pranayanti*,' is one thing and it is quite a different thing to know whether it is to apply to the Saumika Yajna or to the Darshapaurnamashi Yajna. In the same way, when the texts describe some act, it is one thing to comprehend the act described and another to know whether it is obligatory or otherwise. In this case the distinction no doubt exists as to the interpretation and application of texts, but it is not sharp. The primary rule, therefore, in this connection is to determine whether a text is to be applied as obligatory, or it is to be taken as quasi-obligatory or as altogether non-obligatory. This rule is of great importance in the general principles of the application of texts.

SECTION I. OBLIGATORY, NON-OBLIGATORY AND QUASI-OBLIGATORY VIDHIS

The Vedic texts may be classified as follows:—

I. Obligatory:—(1) *Vidhi विधि* (injunction).

(2) *Nishedha* or *Pratisedha* निषेध (prohibition).

II. Non-obligatory:—(3) *Arthavada* अर्थवाद (explanatory statement).

(4) *Namadhya* नामधेय (nomenclature).

III. Quasi-obligatory:—(5) *Mantra मन्त्र* (sacrificial formulæ).

An **obligatory** text is one which imposes an obligation, either in the shape of a principal Vidhi, or an applicatory Vidhi, or as a necessary condition to the doing or not doing of a thing enjoined by a Vidhi or prohibited by Nishedha.

A **non-obligatory** text is one which neither imposes an independent obligation nor adds to an obligation already imposed.

A **quasi-obligatory** text is one which creates an imperfect obligation. It occupies an intermediate position between the two and is sometimes invested with the character of a Vidhi and sometimes not.

This classification is intricate, as there is a large number of texts, which on the face of them are of a dubious character; or, in other words, which apparently belong to one class, but which, in fact, should belong to another. It sometimes appears a very difficult task for the interpreter to determine the true application of such texts or the true character of a text, the intention of which is expressed clearly. A similar difficulty

is often experienced in the interpretation of the Vedas, the Smritis, and modern legislative enactments.

Maxwell (y) says, "Passing from the interpretation of the language of statutes, it remains to consider what intentions are to be attributed to the Legislature, where it has expressed none, on questions necessarily arising out of its enactments."

**Comparison of:
object and reason — Pradhana
Chodana.**

"Although, as already stated, the Legislature is presumed to intend no alteration in the law beyond the immediate and specific purposes of the Act, these are considered as including all the incidents or consequences strictly resulting from the enactment."

The object and purpose of the Vedic law is expressed in one broad statement in the shape of a general injunction—the *Pradhana Chodana* (the primary command), *vis.*, *Svarga Kamo yajeta* स्वर्गकामो यजेत । (attainment of heavenly bliss). Regard being had to this main purpose and object of the Vedas, the application and the true character of all imperfect and obscure texts are settled. This process with regard to ascertainment of objects and reasons is resorted to in the case of modern enactments; it should be similarly resorted to in connection with Smriti texts and the texts of digest writers.

In the Vedic law, what is an Arthavada as distinguished from a Vidhi? It does not impose any obligation additional to the Vidhi and is in the shape of an allegory, parable or a fable. It is in the nature of a parenthetical explanatory clause, either containing a praise of the Vidhi, or giving a popular illustration of it or showing some popular reason for it. But in the Smriti literature or in the digest there is no Arthavada in the shape of an allegory, parable or a fable. So Vedic Arthavada of this nature may be left out of consideration, but Arthavada dealing with popular reasons and popular illustrations is similar in both the Vedic and Smriti literature. These should not be confused with obligatory texts. The Mimansa rules have taken special care to prevent such confusion, as for instance, the rule of

I. Vidhivannigadadhikarana.

Vidhivannigadadhikarana अथ विधिवन्निगदाधिकरणम् [Jaimini I. ii. 2]—the topic of Arthavada looking like a Vidhi. This topic consists of the following

Sutras :

The objector : "Why not take(a descriptive clause) having an effective sanction, as a Vidhi; to take it as a mere description is to make it useless." विधिर्वा स्यादपूर्वत्वात् बादमात्रं ह्यनर्थकम् [Jaimini I. ii. 19].

The objector continuing, "would you say (its apparent operative

character) is like the light talk of common people." लोकवादेति चेत् ॥ [Jaimini I. ii. 20].

The objector himself answering : "It cannot be so, for in the latter case there is some antecedent cause." न पूर्वत्वात् [Jaimini I. ii. 20].

Jaimini says, "The whole thing has been explained, as it is a case of an explanatory cause forming part of a Vidhi." उक्तं तु वाक्यशेषत्वम् [Jaimini I. ii. 22].

Proceeding he says, "In some cases to treat a text as a Vidhi is to make it useless. Therefore, it is properly taken as a gloss. In all like cases it is to be so taken." विधिश्चानर्थकः कश्चित् । तस्मात् स्तुतिः प्रतीयेत । तत्सामान्यादिरेषु तथात्वम् ॥ [Jaimini I. ii. 23].

An illustration would make it clear : "The Indian fig tree is the tree wherewith the sacrificial post is to be made." "The fig tree is strong and the sacrificed animal (to be tied to it) is strong ; so strong animals are (safely) tied to it. [Taittiriya Samhita II. 1. 1. 6]

उदुम्बरोयूपोभवत्युर्गवा उदुम्बर उर्कपशव उज्जैबास्मा उज्जपशुनवरन्धे ।

In this text the first clause is a Vidhi, *viz.*, that the Yupa (post) is to be made with the *oudumvari* (fig) wood. This fully gives all that is required in the shape of a Vidhi in this connection. The following clauses, *viz.*, 'the fig tree is strong' 'the animal is strong' are merely descriptive. To treat them as Vidhis, that in making the Yupa you must get a strong fig tree and also a strong animal, *etc.*, will have the effect of stultifying the Vidhi by which the Yupa is to be simply made of the fig wood without any condition. So Jaimini says that the descriptive clauses must be taken as giving a description of what happens.

Another illustration of this fundamental principle of distinguishing an obligatory from a non-obligatory text from Jimutavahana (paras 29 and 30, Chapter II, Colebrooke) will be profitable—

"Though immovables or bipeds have been acquired by a man himself, no gift or sale of them by him, unless convening all the sons "

स्थावरं द्विपदश्चैव यद्यपि स्वयमर्जितं ।

असम्भूय सुतान् सर्वान् न दानं न च विक्रयं ॥

This text relates to self-acquired property and says, 'no sale or gift of the same.' The sentence is defective. Either the words 'must be made' or the words 'should be made' ought to be supplied. If the words 'must be made' were supplied, then you bring into existence a Vidhi, which would stultify the well-known Vidhi admitted by all, that a man has absolute power of disposal over his self-acquired property. It is for this reason that Jimutavahana would read it by supplying the words, 'should be made,' thus making the clause

as a mere precept or Arthavada. So he affirmatively says that in such a case a gift or sale even if made is not a nullity, for a fact cannot be altered by a hundred texts. **तथाहि कर्त्तव्यपदमवश्यमत्राध्याहार्यं तेन दानविक्रयकर्त्तव्यानि ।** He is sometimes charged with the violation of judicial rules of construction in his above view.

Another important principle for distinguishing an Arthavada from a Vidhi is Hetuvannigadadhikarana **अथ II. Hetuvanni-gadadhi karana. हेतुवन्निगदाधिकरणम् ।** [Jaimini II. ii. 3]—the topic of *a descriptive clause in the shape of a reasoning.*

This Adhikarana lays down that where there is the statement of a reason showing why a particular thing is enjoined in an applicatory Vidhi, this reason should not be taken as an essential part of the Vidhi, that is to say, the obligatory nature of the words of the Vidhi text is not affected by the statement of the reason. If it were so affected, the Vidhi should cease where the reason would cease. This principle is given by the following Sutras :

The objector :—"The reason must be taken as being the essence and the basis of the Vidhi." **हेतुर्वास्यादर्थवत्त्वोपपत्तिभ्याम् ॥** [Jaimini I. ii. 26]

Jaimini.—"A reason is but a gloss, as it is preceded by an operative clause and it does not form the mandatory term of that clause." **स्तुतिस्तुशब्दपूर्वत्वादचोदना च तस्य ।** [I. ii. 27].

Jaimini continuing—"If you say even as a gloss it would be useless." [I. ii. 28] **व्यर्थं स्तुतिरभ्यायेति चेत् ।**

He himself answers—"It will be useful as inducing men to a Vidhi in a popular way." [I. ii. 29] **अर्थस्तु विधिशेषत्वात् यथा लोके ।**

"He sacrifices by a winnowing basket, because food is prepared

Illustration. by it." [Taittiriya Brahmana I. vi. 5] **शूर्पेण जुहोति, तेन ह्यन्नं क्रियते ।**

"If the duty of sacrificing by a winnowing basket were subject to the reason that the preparation of food is assisted by it, then it might be said that the Vidhi is for sacrificing with anything which assists the preparation of food, as for instance, fuel, *etc.* But the Vidhi is absolute that the sacrifice is to be made with the winnowing basket, no matter what service one expects from such basket. The statement of the service is merely a compliment, a mere popular praise to interest people in such a sacrifice. But it does in no way affect the obligation itself and the consequence of its non-performance. It is merely an Arthavada, not being included in the operative or the commanding clause, which is restricted to the use of the winnowing basket [Jaimini I. ii. 27] **स्तुतिस्तु शब्दपूर्वत्वादचोदना च तस्य ।**"

One of the reasons in the enactment of the rules of Permanent Settlement States was said to be that it would induce the zamindars to treat their tenants well. If this reason be a part of the law, the permanent settlement would be void in the case of maltreatment of tenants by zamindars. It cannot be said that the statement of the reason is no part of the law contained in the Regulation. In the sense of the Mimamsa it is an Arthavada just as the reason for using the winnowing basket at the sacrifice is an Arthavada.

Non-obligatory texts are such as put an interpreter in an exceedingly perplexing dilemma, as he is not to commit any violence to language while at the same time he must be faithful and stick to the purpose and object of the law. The difficulty arises when the literal construction goes against the declared object and purpose of the law. The construction which may obviate or minimise this evil, should be resorted to. According to Maxwell: "A sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two possible interpretations."

Namadheya (non-obligatory) text may be illustrated by: *Shyenena abbicharan yajeta*. श्येनेन अभिचरन् यजेत । It means, 'let those who are so minded perform the ceremony of hurting or destroying his enemy by the *shyena* (hawk)'. The literal construction would be against the declared law, *vis.*, the attainment of spiritual or heavenly life.

Kumarila Bhatta and others following him interpret the word *shyena* as not having any real meaning at all, but being a figurative expression meaning the name of a Yagya. They do not deny the said text to be a Vidhi, but allege that it is a mere nominal Vidhi or rather a parody of a Vidhi. But Savara Swami [II. i. i.] holds that it is not a Vidhi text at all, as the sanction of every Vedic Vidhi must be the Apurva sanction of realising heavenly bliss (*Swargukama Bhavana*), and this sanction being absent in this text, it cannot be a Vidhi at all.

Difference between Kumarila Bhatta and Savara Swami. तस्मात् भावार्थाः कर्मशब्दा अपूर्व चोदयन्ति इति । अथ कस्मात् उभयं सूचितं भावार्थाः कर्मशब्दाः इति । उच्यते भवन्ति केचित् कर्मशब्दाः न भावार्थाः यथाश्येनैकचित्रादयः ।

So he would read the imperative mood as an indicative mood and take the text as merely a description to the effect that Shyena Yajna is a ceremony to cause hurt to an enemy. The like texts were similarly treated by him. The text '*Pashukano udvida yajeta*—(those who want to have animals are to perform sacrifice by *udvida*, was construed to mean

that the ceremony called vegetable Yajna means sacrificing for animals. The imperative mood was not taken by him as *Chodana* (command) with a sanction. He alleges that there is no sanction and that after performing a ceremony for animals, no animal is found to be forthcoming. So the object is not attained.

**उपलम्भकानि चेदियानि पश्वादीनां, न च पशुकामेष्ट्यन्तरं पशवः
उपलभ्यन्ते । अतोनेष्टिः पशु-फला ।**

Sutra 2, Chap. IV, Book I of Jaimini also supports the above construction of Savara Swami by the assertion that "that text is Namadheya, of which in origination there is no Apurva sanction."
अपि वा नामधेयं स्यात् यदुत्पत्तावपूर्वमविधायकत्वात् ।

This exceptional construction is not only the peculiarity of the Hindu system of interpretation, but it is to be found in the modern system as well, as is evident from the following observation of Maxwell :

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar; giving an unusual meaning to particular words; by altering their collocation; by rejecting them altogether; or by interpolating other words; under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give the true intention." (x)

The difference between obligatory texts and quasi-obligatory texts may now be considered. Vidhi and Niyama when applied to the transcendental matter, have a sense which is not quite the same which they have when applied to ordinary matters. The former when applied to the transcendental object of heavenly bliss, is defined as being a law by observing which one secures what is otherwise absolutely not securable by ordinary means; while the latter when applied to a transcendental object, is a rule by observing which one secures, though not what is absolutely otherwise not securable, what is partially not securable otherwise. For example, the Sruti that declares that paddy is to be unhusked by a particular process is a Niyama. There is nothing transcendental in the process and the unhusking may be done by other

**Similarity with
modern system.**

Vidhi and Niyama distinguished.

means. The question arises what is there in it which is not otherwise securable? The act of unhusking associated with a certain mantra forms the Niyama and not the act alone. The Apurva result which is secured by the recitation of the mantra is the transcendental part of the sanction. Karika has explained this transcendental sense in which the two terms Vidhi and Niyama are used: *Vidhiratyantamapraptau Niyamah pakshike sati, tatra chanyatra cha praptau parisankheti giyate.*

विधिरत्यन्तमप्राप्तौ नियमः पाक्षिके सति ।

तत्र चान्यत्र च प्राप्तौ परिसंख्येति गीयते ॥

Jaimini has clearly shown that Vidhi and Niyama when applied to ordinary matters in the form of applicatory Vidhis, are used in the sense of imperative rules and directory rules respectively. Thus Niyama has been used by Mimansakas as only a directory rule.

In some cases, such as where a Niyama is expressly made inflexible by shutting out provisions for substitution, it has the force of an imperative rule. Similarly, Vidhi is also sometimes lowered to the position of a Niyama as circumstances may require. *Niyamartha Kwachit Vidhi नियमार्थः क्वचित् विधिः* [Jaimini VI. iii. 16]. A Niyama may be said to be Guna Sruti (subsidiary or incidental statement) *नियमार्था गुणश्रुतिः* [Jaimini III. iv. 40].

Briefly put, when a Niyama enjoins the use of a thing for a certain purpose which is not available, any other thing which would serve more or less the same purpose may be used. In such a case it is not very far from being a quasi-obligatory text. One may not be fully justified in calling Niyama texts as quasi-obligatory, but it is not so with Parisankhya text, which simply declares that certain things are fit to be done.

Again the Mimansakas make a distinction between Kratu Dharma and Purusha Dharma, as between a positive law and a quasi law. For illustrating the Purusha Dharma the following Adhikarana of Jaimini [III. iv. 2] *सुवर्णधारणादीनां पुरुषधर्मताधिकरणम्* । regarding the wearing of gold ornaments may be cited. "Bright gold (ornaments) are to be worn : his enemy becomes pale : he obtains beauty who wears beautiful clothes." [Taittiriya Brahman II. ii. 4. 6] *तस्मात् सर्वं हिरण्यं भाव्यं । सुवर्णं यत्र भवति । सुवाससा भवितव्यं रूपमेव बिभर्ति ॥* This Adhikarana lays down that the text gives only a direction that men engaged in solemn ceremony should wear gold ornaments and good dress. It is not a duty imposed on a man in connection with the

**Kratudharma
and Purusha-
dharma distin-
guished.**

ceremony, but is a rule about his social conduct. The Sutra of Jaimini [III. iv. 20] on the subject is to the following effect :

"Not being connected as Prakarana (subordinate act to a thing positively enjoined), and being separable from it, texts like the above Vedic texts constitute only *Manushyadharma* (a duty of individual conscience)."

अप्रकरणे तु तद्धर्मः ततो विशेषात् ।

Savara Swami [III. iv. 20] says as under with regard to the above Sutra :

"Is this a subsidiary enjoined duty, or is it merely a duty of the man? The answer is, not being connected as Prakarana (subordinate act to a thing positively enjoined), and being separable from it, texts like the above Vedic texts constitute only *Manushyadharma* (a duty of individual conscience). Why so? Because it is not within the scope of the particular subject enjoined. Nevertheless it is a general direction, so it should be generally attended to."

तत्र किं प्रकरणधर्मः उत पुरुषधर्मः ? इति संशयः । अत्र उच्यते, अप्रकरणे तद्धर्मः, ततो विशेषात् । पुरुषधर्मः एवञ्जातीय वा स्यात् । कुतः ? प्रकरणाधीतात् विशेषोऽस्य नायं प्रकरणाधीतः यदि अप्रकरणे समाम्नातः सर्वप्रकरणधर्मः स्यात् । अप्रकरणे समाम्नातं न किञ्चित् विशेषं कुर्यात् । तस्मात् एवञ्जातीयकः पुरुषधर्मः इति ।

In the same way, as regards the Adhikarana about the impropriety of conversing with a woman in dirty clothes [Jaimini III. iv. 7] **मलवद्वासः संवाद निषेधस्य पुरुषधर्मताधिकरणम् ।** it is laid down that the rule bears on the general moral conduct of a man [III. iv. 18] **प्रागपरोधात् मलवद्वाससः ।** Again in the Adhikarana corresponding to Sutra 17: Chap. IV, Book III called *Avagoranadinam pumanthatadhikarana* (the topic of the sinfulness of assaulting, etc., a Brahman, being a direction regarding common life), **अवगोरणादीनां पुमर्थताधिकरणम् ।** [III. iv. 6.], the same principle is laid down **शंयौ च सर्व्वपरिदानात् ।** The texts that provide for penance to those who assault a Brahman or otherwise maltreat him are provisions for the general duty of a man and have nothing to do with any particular ceremony enjoined. There is another Adhikarana as regards the duty of performing the Agnihotra ceremony [Jaimini II. iv. I] **अथ यावज्जीविकाग्निहोत्राधिकरणम् ।** "There is a text *Yavajjivamagnihotram juhoti* **यावज्जीवमग्निहोत्रं जुहोति ।** i. e., Agnihotra should be performed throughout life. With regard to this text the objector says that the expression 'for life' is connected essentially with the Agnihotra sacrifice itself. He means to say that if Agnihotra is not performed

throughout the lifetime of a man, it ceases to be Agnihotra. Jaimini's conclusion is that the instruction for performing 'for life' is an instruction for the man in connection with the Sruti कर्त्तव्यश्रुति संयोगात् । [II. iii. 2]. The Sruti by virtue of which the direction is made relates to the moral duty of a man. It says that if a man does not perform Agnihotra in the last stage of his life or before death, then he would suffer such and such consequences. Accordingly the conclusion is that the rule, so far as it speaks of whole life, is directory. It would be enough if a man perform the sacrifice before his death. Thus the distinction between Kratudharma and Purushadharma is really one between a rule of positive law and a rule of conscience. The Sastra writers would not derogate from the importance of the latter class of rules (rules of conscience) by calling them quasi-law. But all the same according to modern terminology the term "quasi-law" would be quite applicable to this class of law."

"The injunctions regarding the carrying out of sacrifices relate to specific and definite matters. Moreover, the rules regarding these have to be administered by certain constituted authorities *vis.*, the priests assembled on the occasion of each Yajna. They constitute a sort of ecclesiastical tribunal. So these rules relating to *Kratudharma* fulfil the conditions of positive law. On the other hand, what is called *Purushadharma* (duty of conscience) is something of a general character. So even from the Vedic point of view they could not be included within the definite and strict rules of sacrificial duty. No doubt they are of higher importance in social life than sacrificial duties. This is admitted by the Mimansakas. With reference to the first sutra of chapter I, Book IV, Savara Swami says that the purpose of the Kratu ceremony is subordinate, the purpose of Purusha is principal अङ्गं क्रत्वर्थः प्रधानं पुरुषार्थः । This is unobjectionable. Who can deny that moral law and spiritual law are higher than the municipal law? Still from a juridical point of view the latter is called the positive law or law proper, and the former are called only imperfect law or quasi-law." (x)

The same distinction between what is positive law and what is merely a moral precept has been set forth by our digest writers, Jimutavahana and Vijñaneshvara. Many regard it as a new idea introduced by these writers.

"There is another form in which the Mimansakas practically distinguish between a Vidhi and a quasi-vidhi. They make a distinction between what is called **Arthakarma and Pratipatti-karma.** *Arthakarma* (work for the main purpose) and

(x) K. L. Sarkar's *Mimamsa Rules of Interpretation*, p. 136.

Pratipattikarma (works merely incidental thereto). In fact, the distinction between the *Arthakarma* and *Pratipattikarma*, corresponds to what English writers on interpretation make between conditions which are essential to the intention of the Legislature and incidental conditions which are merely directory." Maxwell observes as follows :—

"The reports are full of cases without any such indications of intention ; in some of which the conditions, forms, or other attendant circumstances prescribed by the statute have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity ; while in others, such prescriptions have been considered as merely directory, the neglect of which did not affect its validity or involve any other consequence than a liability to a penalty if any were imposed, for breach of the enactment. The propriety, indeed of ever treating the provisions of any statute in the latter manner has been sometimes questioned ; but it is justifiable in principle as well as abundantly established by numerous authorities."

"The distinction between *Arthakarma* (essential act) and *Pratipattikarma* (incidental act) is fully explained by Jaimini in Chapter II, Book IV, from sutras 10 to 12. The texts regarding the essential acts must be taken as obligatory texts, but those regarding the non-essential acts are, of course, of a quasi-obligatory character. The Mimansa writers have clearly distinguished between texts—obligatory, non-obligatory or, quasi-obligatory."

Texts relating to Arthavada are not obligatory but those of **Manushya dharma and Arthavada.** Manushya-dharma (general morals) as laws of conscience are obligatory, and such a distinction between the two has been set forth by the Mimansakas. This text in the first Adhikarana of Chapter IV, Book III may be considered for the sake of illustrating this point : "The *Nivita* (putting the sacred thread across the left shoulder) is of men ; the *Prachinavita* (putting the sacred thread across the right shoulder) is of the *manes* ; the *Upavita* (putting the sacred thread round the neck) is of gods. He, indeed, makes a sign of god when he wears Upavita (the last mentioned way of using the sacred thread)." [Taittiriya Samhita 2, 511, 1] :

निधीतं मनुष्याणां प्राचीनावीतं पितृणामुपवितं देवानामुपव्यते
देवलक्ष्मीमेव तत् कुरुते इति ।

The question that arises in this text is whether the first two clauses relating to *Nivita* and *Prachinavita* should be read severally with the operative clause which indicates the duty of wearing, although this expressly relates to *Upavita*, or that these clauses are mere Arthavadas to show the importance of the *Upavita*. The answer is that the above

two clauses have been taken as Arthavada. This Adhikarna may well bear upon the construction of the texts of Manu describing several kinds of marriages one of which, the Brahma form, being taken to be preferable to the rest, may be taken as the Vidhi proper.

The Anritavada Nishedh-adhikarana **अनृतवाद् निषेधाधिकरणम्** as given by Sutra 12 and 13, Chapter IV, Book III, has discussed the text "Do not tell a lie"—"*Na anritam vadet*" **नानृतं वदेत्** । The point raised is whether this precept to avoid speaking falsehood is merely a moral precept (*Purushadharma*), or it is a positive law regarding the Darsapaurnamasi Yagya. The opponent wants to make it to be merely an Arthavada though of a general and permanent character (*Nityanuvada*). The conclusion is that it is neither an Arthavada nor a Purushadharma, but it is a part and parcel of the injunction of Darsapaurnamasi Yagya ; and, as such, it is a positive Vidhi. K. L. Sarkar (p. 189) has summarised the effect of this conclusion thus : "As under our present criminal law if a man speaks a falsehood under an oath he is to be punished, but not so when he speaks a falsehood simply ; so by making the text Kratudharma, the man who speaks a falsehood when engaged in a Yagya ceremony, is not simply liable to be condemned as a liar, but is liable to be punished by penance. This explains clearly the distinction between the Manushyadharma and the Kratudharma."

The rules to determine the persons to whom particular texts apply, the order in which they apply, the order in which texts mentioned in one connection are to be applied to other cases, and the necessary variations and omissions in making such applications would now be dealt with in the following sections.

The various tests to distinguish each of these classes into which Veda has been divided bring into display the general Mimansa principles regarding the application of texts, and there lies their importance :

Namadheya is that portion of the Veda which denotes the name of a sacrifice. There are four tests for its distinction. The **first** is the avoidance of *laksana* or deviation from the literal meaning (a). The term *udbhid* in the Vedic text : **उद्भिदा यजेत पशुकामः** (b) illustrates this point. Jaimini while dealing with *Udbhidadhikarana* raises a doubt whether the word *Udbhid* occurring in the text is the name of a sacrifice or the name of a material to be used at a sacrifice. "An objection is put forward that *Udbhid* means an axe by adopting the *Karanavyutpatti* or a derivation involving the instrumental case. In answer it is pointed out that even if an axe or anything of the sort

(a) Jaimini's Purva Mimansa 1. 4. Adhikarana 2.

(b) Tandy Brahmana 19. 17. 3.

is supposed to be the literal meaning of the word *Udbhid*, in view of the juxtaposition of the root *Yaj*, meaning a sacrifice, it has to be interpreted to mean not 'an axe' but 'possessed of an axe' which is not its literal meaning. Therefore by taking the literal meaning of the word to be an axe, the interpretation of the text in question involves *Matvarthalaksana*, and when it is possible to understand a particular word in its literal meaning, it is improper to adopt a construction which would involve a deviation from the literal meaning, and therefore *Udbhid* ought to be treated as the name of a sacrifice." (b)

The **second test** is the avoidance of *vakyabheda* or multiplicity of principal clauses (c). Whether the word *chitra* in the text चित्रया यजेत पशुकामः is a nomenclature or denotes a material to be offered at a sacrifice. In the latter view it would follow that the two qualities of variegated colour and feminine gender—*chitratva stritva*—are enjoined, and as this inevitably leads to *Vakyabheda* (lit. the splitting up of a sentence) or a plurality of co-ordinate ideas which it is always the attempt of Mimansakas to avoid, the theory is upheld that *chitra* is the name of a sacrifice.

The **third test** is generally termed *Tutprakhyanyaya* (e). This principle determines whether the words *Agnihotra* and such others mean names of sacrifices or not, as in the texts: अग्निहोत्रं जुहोति and आघारमाधारयति । When two texts refer to the same member of a sacrifice, the prior text lays down the auxiliary of the sacrifice, and the word referring to the same idea in the latter text must be deemed to be a nomenclature.

The **fourth test** is the *Tadvyapadesa* principle by the help of which words like *syena* or eagle and others occurring in texts like श्येनेनाभिचरन् यजेत (f) may be interpreted to mean sacrifices; as the complementary passage of this text is: 'Just as a *syena* pounces upon and takes away his prey, so does the sacrifice in question pounce upon and rake away the enemy.' The simile between the literal meaning of the word *syena* and the sacrifice in the command of which the word occurs, suggests that the said word means the name of a sacrifice.

Mantras are generally hymns addressed to gods at sacrifices and their function is to bring to mind a thing that ought to be performed *Anusthetharthaprakāsana*. They are of three kinds: *Rig*, *Yajur* and *Sama*. This classification is not to be confounded with *Rig Veda*, *Yajur Veda* and *Sama Veda* and this difference has been discussed

(b) C. Shankararama Shastri-Fictions p. 55.

(c) Jaimini's Purva Mimansa 1. 4. Adhikarana 3.

(d) Taittiriya Samhita, 3. 4. 6.

(e) Jaimini Purva Mimansa 1. 4.

(f) Ibid 1. 4. 5.

by Jaimini in the Chapter of *Purva Mimamsa* [II. 1. Sūtras 35, 36 and 37] while dealing with the relative weight of *upakrama* or the beginning, and *upasamhara* or the close. These words have been defined in these maxims :

- (1) तेषामृत्यन्त्रार्थवशेन पादव्यवस्था,
- (2) गीतिषु सामाख्या and
- (3) शेषे यजुश्शब्दः

The mantras composed in metre are termed *Rks*; *Saman* is applied to the different methods of chanting recognised in the Vedas and the whole mass of mantra portion goes by the name of *Yajus*.

Arthavada forms an indispensable part of a Vidhi. As to how an Arthavada is made complement to the Vidhi is based on the *Mimamsa* principle that when an Arthavada text occurs near about a Vedic command, the complementary Arthavada will be deemed to praise or eulogise the performance of an act and in case of a prohibitory act it may be deemed to condemn the prohibited act.

Function of Arthavada to eulogise or condemn acts referred to in Vidhis.

This principle is illustrated by the following texts:

वायुर्वै क्षेपिष्ठा देवता, वायुमेव स्वेन भागधेये-
नोपधावति, स एवैनं भूतिं गमयति । (a)

‘Wind-God is the swiftest deity ; one approaches him by his own good luck ; and He alone brings him prosperity’ which follows the Vidhi text—

वायव्यं श्वेतमालभेत भूतिकामः । (a)

A man desirous of prosperity must sacrifice a white beast for *Vayu*.

The following text illustrates a *Pratisedha* followed by a condemnatory Arthavada :

‘Silver ought not to be given in the *barhiś* sacrifice. Rudra wept, and his tears became silver. A giver of silver will witness weeping in his house before the expiry of a year.’ (b)

It is a settled fact that Arthavada has no independent authority of its own. In order to estimate the value of Arthavada the threefold distinction of Arthavada into *Gunavada*, *Anuvada* and *Bhutarthavada* must be considered.

विरोधे गुणवादः स्यादनुवादोऽवधारिते ।

भूतार्थवादस्तद्वानादर्थवादस्त्रिधा मतः ॥ (c)

(a) *Taittiriya Samhit* II. 1. 1. (b) *Ibid* 1. 5. 2. (c) *Anandagiri on Brahmasutra Bhasya* under 1. 5. Sūtra 33.

When an Arthavada text is on the face of it opposed to commonsense, it is said to be a Gunavada; when it is a mere repetition of a thing already known it is an Anuvada; and the rest of the Arthavadas are known by the name of Bhutarthavada.

The two texts **ग्रावाणः स्रवन्ते** (b) and **गावस्सत्रमासत** (c) 'stones float on water' and 'kine performed the *satra* sacrifice' illustrate the first of the three classes of Arthavadas given above. **अग्निहिंसस्य भेषजम्** (d) 'Fire is antidote for snow.' illustrates the second class. The last is illustrated by the story of Sunahsepha and similar other narrations.

Mīmāṃsakas who are staunch believer in the theory : as the sole purpose of the Veda is the commanding of acts, such of those as do not compel the performance of an act are invalid : **आज्ञायस्य क्रियार्थत्वादानर्थक्यमतदर्शानाम्** (e), are obliged to deprive Arthavada texts of their natural meaning and to accept a forced interpretation. In whatever way Arthavadas may be construed to harmonise with the theory of infallibility of the Vedas, it is an admitted fact that Arthavadas played an important part in the development of rules contained in the Vidhi texts by way of extension, restriction or modification of their scope. An Arthavada sometimes alters the meaning of a command to which it is supposed to be subservient. Sometimes instead of restricting, the Arthavada extends the meaning of a Vidhi as is evident from the Smṛiti text of Atri (Verse 52) :

Extent of modification of Vidhi by Arthavada.

अपुत्रेणैव कर्तव्यः पुत्रप्रतिनिधिस्सदा ।

पिण्डोदकक्रियाहेतोर्दत्तस्मात्कस्मात्पयज्ञतः ॥

Only by a sonless man shall be made a substitute for a son by all possible efforts for the purpose of the offering of libations and water.

The text simply says that a man destitute of a son shall be entitled to adopt. The plain meaning of the word 'son' in the above text has been expanded by the following Arthavada.

पुत्रेण लोकाञ्जयति पौत्रेणानन्त्यमश्नुते ।

अथ पुत्रस्य पौत्रेण ब्रह्मस्याप्नोति विष्टपम् ॥

"A man conquers the world by a son, by a son's son attains immortality, and by a son's grandson attains the world of sun." (Manu IX. 137)

The effect of reading the Vidhi and Arthavada texts together is that when a man is possessed of a son or a grandson or a great-grandson he is not entitled to adopt a son.

(b) Taittirīya Samhita 1. 3. 13; Cf. **शृणोत ग्रावाणः**

(c) Ibid 7. 4. 18.

(d) Ibid 7. 4. 18.

(e) Jaimini Purva Mīmāṃsā 1. 2. 1.

Such instances of modification, extension or restriction may be multiplied. But the theory is that no such alteration of Vidhi by Arthavada is possible and this principle is enunciated in *Hetuvannigada-*

Mimamsa theory: A Vidhi cannot be modified by an Arthavada. *dhikarana* of Jaimini (o) which has been the subject of much reference as regards the validity of the adoption of an only son. The text of Vasistha is :

न त्वेकं पुत्रं दद्यात्प्रतिगृहीयाद्वा, स हि सन्तानाय पूर्वेषाम् ।

'One shall not give or receive an only son in adoption, for he is for the continuation of the line of his ancestors.' (Ch XV. Sutra 3 and 4). Mr. Mandlik based its interpretation on the principle of *Hetuvannigad-adhikarana* but conceived it wrongly as laying down that any command followed by a reasoning clause is absolutely null and void. The point round which the whole discussion turns is the meaning to be given to the text : शृण्वेण जुहोति, तेन ह्यन्नं क्रियते । (a) 'One shall perform Homa by the winnow, for by it food is made.'

"The question discussed is whether the Homa under question ought to be performed only with the winnow which is expressly mentioned in the commanding clause of the text, or whether the Homa can be performed with a pounding rod, a jar or a spoon or any other implement used in the preparation of food on account of the applicability of the reasoning clause to such other materials. In conclusion, the former view is upheld principally on the ground that it is not right just to accept a deviation from the literal meaning in a commanding text, and that when the choice lies between straining a word in a Vidhi and that in an Arthavada, the latter ought to be preferred. If we are to strain the language of the Vidhi text in the light of the Arthavada, the word 'winnow' has to be taken in extended signification. If we choose to strain the Arthavada in the light of Vidhi, we have to presume that the reason for the winnow being the subject of Homa is not the capacity to produce food in producing food inhering in the winnow. In the result, the food-productive capacity of the winnow is referred to as recommendatory rather than by way of an independent reason in support of Vidhi. It, therefore, follows that the scope of any commanding clause is not to be extended by reason of a succeeding reasoning clause, and that the reasoning clause ought to be restricted in its operation to the particular object which comes within the purview of the commanding clause. Such being the principle enunciated in the *Adhikarana*, it is no authority for the position that all commanding clauses followed by reasoning clauses are infructuous. It rather establishes that all reasoning clauses following commands are infructuous

On the application of this principle to Vasistha's text, Mr. Mandlik's view is wholly untenable. All the same it ought to be admitted that whenever it suits their purpose, the Mimamsakas mitigate the effect of the principle of this Adhikarana by introducing refined technical distinctions and adopting a liberal interpretation of words occurring in a Vidhi text."^(a)

SECTION 2. ADHIKARA VIDHIS

Adhikara Vidhis (Vidhis relating to title and capacity), which are rules regarding the right to perform prescribed acts have been treated in the sixth chapter of the first *Shutaka* of Jaimini's work. The Utpatti Vidhis impose on men duties to be performed in the shape of sacrificial acts, while Adhikara Vidhis prescribe conditions as to how a man is entitled or has the right to perform sacrifices; and are intended to show to what persons particular Vidhis are applicable.

As regards Adhikara Vidhis, Jaimini does not discuss only the question as to who are entitled to perform sacrifices, but also matters relating to rights of property. As a sacrifice requires the use of things including movable and immovable property, Jaimini had to discuss the question of a man's right to dispose of one thing or other by way of gift. So he discusses the principle of proprietary right with regard to the Viswajit Yagya in Chapter VIII, Book VI. These discussions will be dealt with later on.

It is the general notion found in the Hindu Dharmasastras that *a right implies a duty*, and so where a man cannot perform the duty, he cannot acquire the right. Therefore, the right of inheritance and succession in the Hindu system of jurisprudence depends upon the man's capacity and ability to discharge certain duties belonging to the family, which he is to represent by succession. If he is physically unfit to discharge such duties, he is excluded from the right of inheritance. Jaimini's Adhikaranas regarding the qualifications of the sacrificer and the conditions to which he is subject are essential in following the principles of the Sruti law of exclusion from inheritance and of the principles creating disabilities. Thus the blind, the lame and the dumb are not qualified, as they are incapable of doing the main ceremony and all its Angas, because the omission even of one Anga will invalidate the ceremony. Therefore, it is evident that the germ of the principle of exclusion from inheritance is contained in Jaimini's Sutras.

... The third Adhikarana of the first chapter of the sixth book of

Competency of women to perform Vedic ceremonies.

Jaimini explains the position of woman in ancient India, laying down that women are competent to perform ceremonies :

यागादिषु स्त्रीषु सोदभययोरधिकाराधिकरणम् ।

The objection is : "Women have no money. What money they get becomes the property of the husband, the moment they acquire it. Women are bought and sold and are on a level with chattels." [VI. i. 10.]

द्रव्यवत्वात् पुंसां स्यात् द्रव्यसंयुक्तं क्रयविक्रयाभ्याम् अद्रव्यत्वं स्त्रीणां द्रव्यैः समानयोगित्वात् ।

The answer is, "Women possess Yagas equally with men. Women have control over money, and men require their sanction to make gifts. The custom of making a gift to the bride's father at the time of marriage cannot make the transaction a sale and purchase. The same number of kine are presented to the fathers of brides. If it were a transaction of sale, the price would vary with the merit of the girl. The gift is made because it is prescribed by the Smṛiti that it is a dharma."

फलोत्साहाविशेषात् ।

अर्थेन च रुमवेतत्वात् ।

क्रयस्य धर्ममात्रत्वम् ।

[Jaimini VI. i. 13-15.]

It is also noteworthy that the husband and the wife should jointly perform the Yāgya.

Adhikara Vidhis deal with matters relating to the obligation of performing Kāmya Yāgya; for example, the text "If in the middle of the performance of a Kāmya Yāgya, the desired fruit is obtained, this is no reason that the sacrifice is to be discontinued." The question of a proper substitute for a prescribed material has also been treated in Book VI. The nature of the ceremony is not altered because of the substitution, nor can a ceremony be omitted if the prescribed material be not available, as a proper substitute is permitted. But there can be no substitute for the essential things in a sacrifice. The Devata, the fire, and the mantra, can have no substitute. One sacrificer cannot be replaced by another except in the case of the Sātra Yāgya, if one of the 17 Yajamanas (sacrificers) die in the middle of the ceremony. In this case the deceased sacrificer will enjoy the fruit, for he alone can get the benefit who works from the beginning of the ceremony. The substitute must be as much like the original as is possible. It is the basis of the principle of Hindu Law that the adopted son must be

Matters discussed by Adhikara Vidhi.

the reflection of a son. Trifling defects in prescribed transactions are unavoidable may be overlooked, but radical defects are not to be condoned. For example, where the *Purodasha* is wholly burnt, the Yaga is to be performed afresh; in case it is slightly burnt the Yaga may be continued. These are the conditions under which a man's right to perform a sacrifice is to be exercised. In many cases they suggest the character of the conditions which may apply to the exercise of a person's civil rights.

Some important matters on the subject of Adhikara (status) after discussing what it constitutes may now be considered.

Status of women and Sudras. The aphorisms of Jaimini on the question of the status of the women and the Sudras are more liberal than later Brahminical writings. He lays down [VI. i. 8]: "In the opinion of Badarayana, all without any distinction of class who desire heaven can perform sacrifices. A woman, therefore, is included because there is no class distinction."

जातिं तु बादरायणोऽविशेषात्, तस्मात् स्वयं प्रतीयेत जात्यर्थस्याविशिष्टत्वात्

In fact, in the case of married couples, it is laid down that a married couple with means must join in the same act of sacrifice by virtue of an express text **स्ववतोस्तु वचनादैककर्म्यं स्यात्**. [Jaimini VI. i. 17].

As regards Sudras, the subject is treated in 7th Adhikarana beginning with Sutra 25 Book I, Chapter VI. K. L. Sarkar [p. 195] has observed: "No doubt by this Adhikarana it is settled that by virtue of a Brahmana text of Rishi Atreya, a Sudra is excluded from the Agneya Yagas; but the reasons given do neither involve any contempt for the class nor attribute any inferiority to them. The reasons are that a Sudra is not connected with any Agneya ceremony, and that there is an express text declaring the competency of three classes only in matters of Yajna. In fact the general tenor of all the aphorisms from the beginning of the chapter is to the effect, that *prima facie* all rational beings are entitled to the benefit of a sacrifice, if they appreciate the object of it. The first Adhikarana lays down that there must be thinking men to perform a sacrifice, and that the acts of sacrifice mechanically performed secure no object. This Adhikarana shows that the qualification for sacrifice is ability to perform it rationally and a consciousness of its object. The general enunciation *prima facie* entitles men of any class to perform a sacrifice provided he be not positively disqualified. The author declares a Sudra to be disqualified by virtue of some express texts. We thus find that according to Jaimini the presumption is in favour of qualification until the contrary is shown. So in all cases of mixed castes it is not proper

to hold that men belonging to such castes are disqualified; further, the disqualification of a Sudra seems to be limited only to the Agneya ceremony."

SECTION 3. KRAMA VIDHIS

Krama Vidhis are rules regarding the order in which prescribed acts are to be done and have been dealt with by Jaimini in the fifth chapter of the first Shataka. They indicate the order in which rules and injunctions are to be performed. The relative importance of things is shown by the order in which they are mentioned and as such they constitute in themselves a principle of interpretation called Krama.

Three chief Kramas. (1) The order of succession is sometimes declared by express Sruti, which is then called *Sruti-Krama*.

(2) When the order is determined by the sense of the passage in the absence of an express Sruti, it is called *Artha-Krama* (determination of order by sense).

(3) When the order in which the texts appear gives the indication, it is *Patha-Krama* (succession by reading)

Sruti-Krama. Jaimini defines Sruti-Krama in the first Sutra of Chapter I, Book V in these words:

"What is to be done before and what after is best determined by the indications in Sruti, Sruti being the authority" *श्रुतिज्ञानमनुपूर्व्यं तत्प्रमाणत्वात् ।*

Artha-Krama. Artha-Krama is explained in the next Sutra thus: "It is also fixed by the sense." *अर्थेन च ।*

Patha-Krama. Patha-Krama, that is of fixing the order by the relative position of the texts has been dealt with in Sutras 4 to 7 of the same chapter of the book.

There are three more Kramas of which Prabritti-Krama (order by discretion), only may be mentioned, as it is of importance. It relates to the case in which the things are required to be performed simultaneously, but convenience requires them to be performed successively. It is the subject of the fifth Adhikarana, the Siddhanta Sutra of which is as follows:

"Of those which are to be done simultaneously, the order is determined by discretion with reference to minor considerations, as these form an index." [V. i. 8].

प्रवृत्त्या तुल्य कालानां गुणानां तदुपक्रमात् ।

Strictly speaking, things are to be done simultaneously, yet there is no harm in doing them successively. But where certain things occur simultaneously, simultaneous performance is imperative. The rules regarding the order in Vyavahara law relating to the question of succession of heirs illustrate the importance of this principle. With regard to the succession of a woman's children to her self-acquisition, Jimutavahana refers to the text of Manu, "when the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate"

**Principle of
Krama and
Vyavahara law.**

जनन्यां संस्थितायान्तु समं सर्वे सहोदराः ।

भजेरन् मातृकं रिक्तं भगिन्यश्च सनाभयः ॥

In this text it is not clear whether uterine unmarried sisters and uterine brothers are to take the property simultaneously or one class after the other ; the word "equally" does not remove this doubt but only means equality among the inheritors. Thus it is not the case of Sruti-krama or Artha krama. Some argue on the basis of another text, which lays down that the right of the daughter should be preferred to the son, that the text referred to above must be construed as giving preference to unmarried sisters over brothers. Jimutavahana refutes this contention on the ground that the text declaring the preference of the unmarried daughter to the son relates to Yautuka (property acquired at the nuptial fire) only. So according to him the principle of Arthakrama is not applicable in this case. The Pathakrama is also not applicable, because the words "brothers" and "sisters" occur in the same sentence. The text is then to be interpreted as laying down simultaneous succession of brothers and unmarried sisters. He further points out that although the words "brothers" and "sisters" are not in the *dwanda samasa* (conjunctive compound), which would have made the case absolutely clear, still the use of the conjunctive particle *cha* (and) shows that brothers and sisters are placed on the same footing by this text. This discussion goes to show the importance of the rules regarding sequence in the Vyavahara law.

SECTION 4. ATIDESHA, THE PRINCIPLE OF REFERENCE

Jaimini deals with the principle of Atidesha in chapters VII and VIII and defines it thus :

"If what is prescribed as a duty with regard to one object, applies to another object, this is called Atidesha."

अन्यत्रैव प्रणीतायाः कृत्ताया धर्मसंहृतः ।

अन्यत्र कार्यतः प्राप्तित्तिदेशः स उच्यते ॥

He applies this principle to the performance of sacrifices. The Prakriti is that sacrifice every Anga of which is described by Sruti itself in detail. The Vikriti is a sacrifice, the Angas (details) of which are not described by the Sruti. By the principle of Atidesha it must be inferred that all the Angas prescribed for the Prakriti are by implication intended for the Vikriti also. For instance, all the Angas of the daily Agnihotra are expressly prescribed by the Sruti. The monthly Agnihotra is prescribed by the Sruti, "Monthly Agnihotra should be performed," मासमग्निहोत्रं जुहोति । But the Angas (details) of it have not been mentioned anywhere. Apurva can be produced only by the performance of ceremony with all its Angas. It is, therefore, necessary to find the Angas of the monthly Agnihotra ceremony. In some cases the Atidesha is made by the Sruti itself, as in the case of Ishu Yaga (x)

Savara Swami explains Atidesha thus :

Explanation of Savara Swami.

"Atidesha takes place when a duty prescribed in one place is taken out of that place and is applied elsewhere ; as, for instance, when having laid down that Devadatta is to be entertained with rice, meat, soup and pudding, one says that Yajnadatta is to be similarly entertained. The following Sloka embodies the principle :

"When duties are transferred from one standard (Yajna) to another of the same character, to serve as duties therein, this is a case of Atidesha. That Atidesha is of two-fold kind, either by name or by statement. The former is of three species, by name of action, that of the ceremony accompanying it, and that consisting of a derivative term. The latter is of two kinds, by an express direction and by an inferential process."

अतिदेशो नाम ये परत्र विहिता धर्मा, तमतीत्य अन्यत्र तेषां देशः यथा देवदत्तस्य भोजनविधिं कृत्वा शालिसूपमांसाश्वैः देवदत्तो भोजयितव्यः इति तमेव विधिं यज्ञदत्तेऽतिदिशति देवदत्तवत् यज्ञदत्तो भोजयितव्यः इति । श्लोकमपि उदाहरन्ति ।

प्रकृतात्कर्मणो यस्मात्तत् समानेषु कर्मसु ।

कर्मप्रदेशो येन स्यात् सोऽतिदेश इति स्थितिः ॥

स च नाम्ना वचनेन वा तत्र नाम त्रिविधं अतिदेशकं, कर्मनाम, संस्कारनाम, यौगिकम्, इति । वचनं पुनर्द्विविधं प्रत्यक्षश्रुतं, आनुमानिकञ्च ।

Book VII of Jaimini treats of Atidesha generally, but in Book VIII a special kind of Atidesha has been dealt with, which cannot be vaguely presumed. It must be specifically indicated by a definite relation .

(x) K. L. Sarkar—Mimamsa Rules of Interpretation, p. 201.

(*vishesha*), and that relation is defined thus :

"It is a relation in which one thing contains the indication of another thing and deriving its force from that other would become an incident of it." [VIII. i. 2.]

यस्य लिङ्गमर्थसंयोगादभिधानवत् ।

The second Adhikarana in Book VII lays down the important principle that Atidesha takes place between two Vidhis or two ceremonial duties belonging to the same class [Jaimini VII. i. 2.]

समानमितरच्छ्रयेनेति श्रुत्या इषौ इयेनीयविशेषधर्मातिदेशाधिकरणम् ।

**Achara-kanda
illustrates Ati-
desha.**

Achara-kanda of the Smritis gives numerous illustrations on this subject. For example, it is laid down there that offering of water with sesamum, ghrita and honey, which is to be made after the Piada in Parvana Sradha, is to be performed like the Arghya ceremony of the same Sradha ; that is, as in the latter case the offering is to be made to six ancestors separately, so in the former. अक्षय्योदकदानन्तु, अर्घदानवदिष्यते । Another instance of this is the direction in the Sruti that the Sradha ceremony of maternal grandfathers should be done in the same way as of father and paternal grandfather.

मातामहानामप्येवं भ्रातृं कुर्याद्विचक्षणम् ।

"The Parvana Sradha in honour of the paternal ancestors is in the nature of Prakriti to the Parvana Sradha in favour of maternal ancestors, which is the Vikriti of the former. This fact is of great importance in the Dayabhaga school, in which the number of Piadas given enters into reckoning in settling the order of succession, but is not necessarily decisive in all cases. A Prakriti is not in all respects equal to its Vikriti, it being after all but a copy." (p. 203.)

"According to the author of Tantra-ratnakara not only the manner of doing duties, but also the duties themselves can be implied by Atidesha."

प्रकृतात्कर्मणो यस्मात् समानेषु कर्म सु ।

धर्मोतिदिश्यते येन सोऽतिदेश इति स्मृतः ॥

Jaimini confines the principles of Atidesha chiefly to the practice that the Vikriti Yaga is done in a manner similar to that of the Prakriti Yaga, to which the Vikriti Yaga relates. This principle the Smriti writers have extended to matters of Sradha and the like.

As for example, the Sradha ceremony done during the new moon is regarded as the Prakriti, while the other Sradha ceremonies are

Classification of Atidesha.

regarded as Vikriti of the Prakriti. But later writers have extended application of the principle yet further. They have classified the principle of Atidesha thus :

1. *Shastratidesha* शास्त्रातिदेश—reference as regards the principle.
 2. *Karyyatidesha* कार्यातिदेश—reference as regards the action.
 3. *Nimittatidesha* निमित्तातिदेश—reference as regards the cause.
 4. *Sangatidesha* सङ्गातिदेश—reference as regards the denomination.
 5. *Rupatidesha* रूपातिदेश—reference as regards the form.
- [p. 204.]

Atidesha may be compared with our present Code of Civil Procedure, which provides general rules of procedure which are also adopted in miscellaneous cases by express reference or otherwise. That a rule found to be good with regard to one case is applicable to other analogous cases is derivable from the principle of Atidesha, but the principle of analogy should not be strained and forced. To do so would be nothing but an abuse of Atidesha. Chudamani says regarding sections 31-2-4 of the Dayabhaga :—

“Although the property relates to the case of a superseded wife, yet it may be so assumed in the present case also, conformably with the maxim, that the sense of the law, as ascertained in one instance is applicable to others also, provided there be no impediment.” It is an illustration of a practical application of Atidesha to the general requirements of the positive civil law.”

Another such illustration is furnished by Dattaka Chandrika (para 36, section 2), where matters applicable to the Kshetrāja have been applied to Dattaka sons. But where a brother's son or a co-wife's son is said to be equal to a son, it merely means that for certain purposes they are as beneficial as a son of the body. The Prakriti (pattern) Yaga and the Vikriti (the derived) Yaga must be of the same genus (samana). In the case of an adopted son he is the reflection of a legitimate son. So the rules regarding the rights and status of a son must apply to him by Atidesha, just as the rules of the Prakriti Yaga apply to its Vikriti.

Similarly the principles which govern the law of gifts may be applied to the law of wills which is of a later development. So in *Tagore v. Tagore* (x), their Lordships of the Privy Council have held that a bequest to an unborn person is not valid just as a gift to

an unborn person is not valid. But in the application of the principle of Atidesha in this particular case there must be some limitations (*Badha*). Under the Dayabhaga a gift cannot be revoked, but a will is revocable. The law of gifts should not be absolutely applied to all such bequests in favour of unborn persons; for, certain persons may not be in existence during a testator's life time, but the testator is bound to make provision for their maintenance. So it may be alleged that a provision made by a will for the maintenance of such persons, though not in existence at the time of the death of the testator, is valid by virtue of the express text of Manu regarding the duty of maintaining those who are born and those who may be born. Both the Mitakshara and the Dayabhag schools follow this text implicitly. The case of *Tagore v. Tagore* has not pointed out any exception to the above principle, and such an exception would mean the application of Atidesha subject to limitation (*Badha*). In modern legislation, when a general Act is expressly incorporated into a special one this is analogous to an Atidesha by Sruti. That in working out such Atidesha certain adjustments are to be made is evident from the remarks of Maxwell (y) :

"Where a general Act is incorporated into a special one, the provisions of the latter would prevail over any of the former with which they were inconsistent. It may be added also that when an Act on one subject, such as highways, incorporates some of the provisions comprised in another relating to a different subject, such as poor rates, it does not thereby incorporate the modifications of those provisions which are subsequently made in the latter."

SECTION 5. UHA, THE PRINCIPLE OF ADAPTATION

Jaimini discusses Uha principle in his ninth hook in the sense of an adaptation from a model. He chiefly uses the word 'Uha' with reference to cases in which a mantra used in Prakriti has also to be used in a Vikriti, and the name of the deity has to be altered to suit the Vikriti. In modern writing this term Uha has been given an extended application. It is applied not only to changes of particular words but also to supplying of ellipses, which are undoubtedly indicated by the text of a sentence. Briefly put, Uha (subject of Uha) is what is necessarily implied but not expressed.

Savara Swami divides Uha into three classes, relating to the Mantras, to the Samaveda hymns and to the consecration of things. Kumarila Bhatta objects to the propriety of this classification. He says, 'Uha means reasoning. It is the same, no matter to what objects

it is applied—to Mantra or to the hymns or to the consecration.' (Taptika)

त्रिविधश्चोह इत्येतद् युक्तं । कथं ? उह नाम वितर्कणा । सा चैकरूपा संस्कारेषु क्रियमाणा सैव सा । न तस्याः कश्चिद्विशेषः ।

He further explains that the object of Uha is to ascertain and adjust the required sacrificial acts (*angas*) of material limbs. The above object is introduced by the first Sutra, chapter I, Book IX: "A sacrificial act is the chief thing, that is based on an injunction—material things consecrated in its connection are employed to promote the sacrificial intention."

यज्ञकर्म प्रधानं तद्धि चोदनाभूतं तस्य द्रव्येषु संस्कारस्तत्प्रयुक्तस्तदर्थत्वात् ।

An Arthavada has already been explained to be the statement of a reason with reference to a Vidhi by the **Uha in relation to Arthavada and Niyama.** Adhikarana, the Hetuvannigadadhikarana, and it has been stated by Jaimini in Sutra 52, Chapter II, Book I. So in some cases of applying the Vidhi a necessity may arise to overlook the reason, or a Vidhi may remain and the reason may not exist. Dealing with the statement of reason in this way, it may constitute a case of Uha (use of sound discretion). But the main use of Uha is in connection with Niyama Vidhis, which are generally of diverse character and have sometimes the character of imperative Vidhis, while at other times they are only directory. In Vidhirasayana, Appya Dikshita says, "There is a variety of Niyama Vidhis. They are indeed old Niyamas, but it is not possible to bring them all under the definition of "*Pakshlike sati*" being partly transcendental. For instance, in some cases, out of different means to carry out an action, to fix on one of them is a Niyama. In some cases out of different acts arising from the same means, to fix on one such act is a Niyama. In some cases the two are combined."

हेतुः कुत्रापि कार्यं कचन तदुभयं कुत्रचिद्विध्युपात्तम् ।

विध्या पृष्टं नियम्य कचिदुभयविधिं पाक्षिकत्वेन दृष्टं ॥

तस्यैव प्रत्यनीकं कचिदपि कुहचित् पाक्षिकं

नैव दृष्टं नाना रूपं तदित्यम् नियम विधिगतं दुर्ग्रहं लक्षणम् ॥ विधिरसायने॥

There is greater evidence of stiffness and inflexibility in the Vedic than in the Laukika (worldly) Vidhi. This is due to the simple fact that in the Vedic Vidhis the **Vedic and Laukika Niyama.**

Apurva sanction makes even a Niyama almost imperative. So Niyama texts of the Vedas can be slightly modified by Uha as regards the name of the Devata or the number and gender of

words. But Laukika Niyamas are chiefly directory. As regards the Smritis a Niyama creating a substantive right is an imperatively restrictive rule, but when a Niyama regulates the manner of doing a duty or the manner of expressing a right, it is more or less of a directory nature. For example, the rules that one should marry his daughter before she attains puberty or that one should adopt a boy of such an age have been held to be merely of a directory nature. Uha has full sway over the application of such rules. By Uha-Vichara such rules are relaxed in cases where relaxation becomes necessary.

Uha-Vichara is only applicable to rules more or less of a directory character, but cannot touch imperative Vidhis. For instance, the direction that one must observe the Ekadashi fasting, is an imperative Vidhi with respect to certain classes of persons. But that one should break fast in a certain manner on the next day is a Niyama. By Uha the former rule cannot be relaxed while the latter can.

The modern phrase called "construction most agreeable to justice and reason" is equivalent to the Uha-Vichara of our Mimansakas. Maxwell says, "In determining either what was the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most agreeable to convenience, reason, justice and legal principles should, in all cases open to doubt, be presumed to be the true one. An argument drawn from an inconvenience, it has been said, is forcible in law; and no less force is due to any drawn from an absurdity or injustice." [p 264, 3rd Ed.] Again he observes: "sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two possible interpretations. Whenever the language of the Legislature admits of two constructions, and if construed in one way, would lead to obvious injustice, the courts act upon the view that such a result could not have been intended unless the intention had been manifested in express words." [p. 277, 3rd Ed.]

K. L. Sarkar has elaborately treated the subject thus: "In short, it is a fixed principle that an equitable and reasonable construction should be resorted to in all cases when it is possible. The term Uha is not used by Jaimini in the extended sense of such equitable and reasonable construction. The immediate subject of his construction was the Vedic Revealed Law. So it was not permitted to him to sanction principles of equitable and reasonable construction except

within very narrow limit,"

"But the Smṛiti law, though it is also constructively a 'revealed law, is not on the same footing with the Vedic Revealed Law. It deals with *Laukika* (worldly) affairs. It has often to adjust itself to new social wants and growing usages. Hence the Smṛiti-writers broadly assert almost in the same strain and state that, 'Decision should not be based only on the Sastras. By an unreasonable judgment there is loss of Dharma.' (Vṛhaspati). No doubt the Smṛiti writers will not allow equitable and reasonable considerations to override the clear text of law. So they say, 'Smṛiti is of greater authority than Artha Sastra' (Yajñavalkya). 'When the rules of sacred law and of Artha Sastra are at variance, he must discard the latter and follow the former' (Narada). But it is insisted on that, 'Avoiding carefully the violation of either the sacred law or Artha Sastra he should conduct the trial attentively and skilfully (Narada)."

"Thus in the above Smṛiti text the principle of Uha-Vichara is taken as co-extensive with what we call in modern times equity and good conscience. It is clear that the expression 'Artha Shastra' in the above text means equitable principle or commonsense principles; although in a narrower sense the word means relief, which is the subject of a litigation. From that narrow sense, it naturally passes into the sense of equitable relief, and thence into the general idea of equitable or common sense principles."

In Vyavahara law Artha Sastra means the relief sought for in a litigation, which is allied to the second meaning given in the Amarakosha; and it is practically the same as considerations of equity, the first meaning given to it being the rules of morality and prudence.

अर्थशास्त्रं चाणक्यादि प्रणीतं नीतिशास्त्रं तत्पर्यायः । दण्डनीतिः इत्यमरः ।

SECTION 6. BADHA, THE PRINCIPLE OF BAR

'Badha' may be defined to be exclusion by reason of repugnancy. Primarily it means barring a thing owing to inconsistency. Jaimini has treated this subject in the tenth chapter of his work and uses the principle chiefly with reference to cases where Angas or sub-ceremonies are to be introduced from the Prakṛiti (standard Yaga) into a Vikṛiti (moulded Yaga), the injunctions as to the details of which are not complete.

In case of omissions in the performance of a Vikṛiti Yaga, the Angas or the sub-ceremonies are borrowed from Prakṛiti Yaga, but the sub-ceremonies which are inconsistent or out of place in the Vikṛiti Yaga

Badha with regard to positive texts.

cannot be followed. For instance, in the Rajsuya Yaga plain ground is directed to be taken as the Vedi for the Homas, while in the Darsapaurnamasi the Vedi should be erected by digging with spades etc. There is a Badha of the particular rule regarding the erection of the Vedi in the Darsapaurnamasi Yaga, in extending its application to the Rajsuya Yaga. It is Badha by reason of express text. The Krislmala Nyaya (black bean maxim) is another instance.

"When there is a negative ordinance prohibiting a thing, it is to prevail notwithstanding that there is an Atidesha which by implication enjoins the thing. For instance, there is a rule that all sacrifices partake of the character of Darsa and Paurnamasi Yagas. The result is that all the rules of Darsa and Paurnamasi Yagas are applicable to the Pasu Yaga also. But there is a text which says that the Aghara and the Ajyabhaga Homas need not be made in the Pasu Yaga. Therefore, these Homas need not be made in the Pasu Yaga, though in the absence of the prohibitory text they would have to be made on account of the rule which lays down that all Yagas must partake of the character of Darsha and Paurnamasi. The importance of the principle under consideration will appear in connection with the position, rights and duties of adopted sons who are, by a general rule, declared to be an efficient substitute for an Aurasa son, but whose rights and capacities in some measure vary by some special texts from those of an Aurasa son." [K. L. Sarkar p. 215]

In his learned treatise Mimansa Valaprakasha. (Mukunda Shastri Ed.) Sree Bhatta Sankara gives two-fold divisions of Badha. (1) *Prapta Badha* and (2) *Aprapta-Badha* and defines the former thus :

"Prapta Badha occurs where from Atidesha (reference) of general Sastra and the like a knowledge is engendered to the effect that a thing is inappropriate in all matters. यत्रातिदेश सामान्यशास्त्रादि जनिते स्थाने

1. *Prapta-Badha*.

सर्वविषये वा मिथ्येदमिति प्रत्ययास्तरं भवति स प्राप्तवाधः । It means a Badha (exclusion by repugnancy) of a matter which must be taken as worthless because of some rule or principle of the ordinary Sastra pointing, among other things, to its worthlessness."

1. If there be two casual Vidhi texts, one preceding the other and clashing with each other, the one that precedes is barred by the one that follows पूर्व परेण as in the case of the Apachhedha maxim.

2. That which is needed bars what is not needed निष्प्रयोजनं सप्रयोजनेन वाच्यते ।

3. That which slightly occurs is barred by that which amply occurs **अल्पं भूयसा ।**

4. That which is opportune bars that which is not opportune **सावकाशं निरवकाशेन ।**

5. That which is in the nature of a para is barred by what is in the nature of the whole **अङ्गं प्रधानेन ।**

6. That which serves a practical purpose bars those which are of an ethical purpose, universal or casual **काम्येन नित्यस्य नैमित्तिकस्य ।**

7. That which is directly taught bars that which is obtainable by reference **अतिदेशिकेनोपदेशिकस्य ।**

“Aprapta-Badha has been defined to be a Badha in which the sense of inappropriateness of a particular text or of a particular proposition arises from its comparison with another particular text or proposition weightier than itself.” (Mimansa Valaprakasha p 131).

1. A Sruti of a doubtful character is barred by a Sruti which is free from doubt **असन्दिग्धश्रुतिबाधः ।**

2. A Linga which is more cogent bars that which is less cogent **लिङ्गे नापि लिङ्गं बाध्यते ।**

3. Similarly a Sruti bars a Smṛiti **श्रुत्या स्मृतिर्बाध्यते ।**

4. A Sruti bars Achara also **श्रुत्या आचारो बाध्यते ।**

5. An absolute Smṛiti without reference to any popular reason bars one that is based upon a popular reason **अदृष्टार्थस्मृत्या दृष्टार्था स्मृतिर्बाध्यते ।**

6. An approved Achara bars an unapproved Achara **आप्ता-चारेणानाप्ताचारो बाध्यते ।**

7. An unobjectionable Achara bars an objectionable Achara **अविगीताचारेण विगीताचारो बाध्यते ।**

8. A Smṛiti of the character of a Vidhi bars one of the character of an Arthavada **यत्र तु लिङ्गादौ श्रुतिकल्पना प्रतिबन्धात् ज्ञानोत्पत्तिरेव प्रतिबाध्यतेऽसावप्राप्तबाधः इति ।**

9. A Smṛiti of a doubtful character is barred by one free from doubts **सन्दिग्धमसन्दिग्धेन ।**

10. That which serves a purpose immediately bars that which is of a remote service **आरादुपकारित्वं सन्निपातित्वेन ।**

11. That which is multitarious in meaning is barred by that which has a single meaning **अनेकार्थत्वमेकार्थत्वेन बाध्यते ।**

12. The application of a general clause is barred by the presence of a clause in the nature of *res gestae* **अनारास्वाधीतं प्राकरणिकेन बाध्यते ।**

13. A rule of procedure is barred by a mandatory rule
प्रयोगवचनाश्रयं चोदकाश्रयेन वाध्यते ।

14. A manifest sense bars a sense by context **श्रुत्या लक्षणा वाध्यते ।**

15. A primary sense bars a secondary sense **लक्षणायापि गौणी वाध्यते ।**

16. That which has a single indication is preferable to what has many indications **एकलक्षणाया अनेक लक्षणा वाध्यते ।**

17. An indication of an inherent nature bars one which is not so **निरुद्धलक्षणाया अनिरुद्धलक्षणा ।**

18. That which indicates an action is to be preferred to what merely indicates a capacity **लक्षणयोरपि कार्यलक्षणा धर्मलक्षणा वाध्यते ।**

19. If you can fill up an ellipsis by an expression which occurs in a passage, you cannot go beyond it **अनुपप्लेयाभ्याहारो वाध्यते ।**

20. A Niyama Vidhi bars an Apurva Vidhi **नियमविधिना अपूर्वविधिर्वाध्यते ।**

This rule of bar is not a little striking. An Apurva Vidhi is the highest Vedic Vidhi, and a Niyama Vidhi is only a Vidhi of a subordinate character. How can the latter bar the former? The answer is that the rule is enunciated from the Smriti point of view. In the Smriti law the *drishta* (object of sense) is of greater importance than *adrishta* (supersensuous matter). Therefore, a Vidhi of transcendental sanction has to yield to one of worldly sanctions. From the above rules of Badha we notice that the application of the principle, Badha, is one of the means of adjusting conflicting texts or conflicting considerations. When two texts which are apparently conflicting are capable of being reconciled, they must be so reconciled. This is an axiom. Again where two texts are in direct conflict and they are incapable of reconciliation, both of them lose their force, and one is at liberty to accept the one or the other text at his option. This is also an axiomatic principle. But there is a third consideration, in which, of two conflicting texts or conflicting considerations one is to override the other. This is called Badha. It means that when one of two conflicting things has a presumption in its favour, it bars the other which can claim no such presumption." (p. 219)

Savara Swami in his commentary on Sutra 14, Chapter III, Book III has fully discussed the three ways of dealing with conflicts and has shown that where two contradictory texts are both of equal force, there only is contradiction proper (*Virodha*). When one of them possesses

**Savara Swami's
treatment of
conflicting texts**

greater force than the other, the former supersedes the latter, and this is called Badha. In cases of apparent conflict where the texts cover different grounds and are yet compatible with each other, there is neither Virodha nor Badha.

When there is a conflict between the Smriti texts, no presumption in favour of one writer in preference to another can be raised or that one Smriti text cannot create a Badha of another. In reality two conflicting texts are rarely in direct contradiction to each other, as they, on a given subject, are supposed to be derived from and to conform to one and the same missing Sruti text. Therefore, a direct conflict between two Smriti texts cannot be assumed. The principle of option cannot consequently apply to apparent contradictions. The digest writers are, therefore, bound to reconcile the varying Smriti texts somehow or other.

Reconciliation of Smriti texts.

SECTION 7. TANTRATA AND PRASANGA

"Tantrata (etymologically meaning extension) involves the principle of avoiding repetition of acts, when a single act would serve the purpose."

"Prasanga denotes incidental duties. It imports the principle that the performance of the major duty dispenses with the performance of minor duties which are involved in it."

Avapa is the reverse of Tantrata. It is the repetition of a thing many times to make it useful to many more people. The principle of these two rules is generalised and briefly put by modern jurists thus : "An act enjoined by the Sastras need not be performed more than once." This principle may go some way in giving the widow of the adopter a right to adopt a second time when her adopted son dies leaving a widow with no issue, as the adoptive widow having the permission to adopt is half his body. This principle has no bearing to simultaneous adoption, which has been held to be invalid, although Dr. Siromoni says that the principle applies to such a case.

CHAPTER VI

MIMANSA RULES REGARDING THE SMRITIS AND USAGES

SECTION I. INTRODUCTION

In the Hindu legal system we have the *Sruti* and the *Smriti*; the *Sruti* which is the revealed law is more authoritative, and from it is derived the *Smriti* law. They may be likened to the Statute Law and the Common Law of the Western system of jurisprudence. The Statute Law is in set language and is in itself authoritative just like the *Sruti* Law; while the Common Law or the Customary Law may or may not be in writing and is not in itself absolutely authoritative. The *Smriti* Law which is associated with the customary Law of the Hindus is almost of the same character. The principles of construction, such as the axioms, the general principles, *Sruti*, *Linga*, *Vakya* and *Prakarana*, are based on considerations of the characteristics and properties of language. They mainly bear on the interpretation of the Vedic Law, and are similar to the rules of construction of the statutes. *Jaimini* has framed additional rules for construing the *Smriti* Law and *Prayoga* or Usage Law which are based on different considerations altogether. The same is the case with the construction of the common Law and the customary Law in the English system of legal literature.

In these days, the Common Law is practically the same as the Case-law. As regards statute law there are various rules of construction, such as, the principles of literal construction, construction by context, special rules of construction *etc.*, but a different set of rules and principles is required for Case-Law. They are: (1) A ruling or a decision of a court is to be interpreted so as to make it agree with the provisions of Statute on the subject. (2) If it be at variance with the statute, it must be disregarded. (3) The ruling or decision is to be held good only so far as the actual question raised in the case required it. (4) In interpreting a decision the question is not what the judge intended but how far his judgment is based on the facts of the case, whereas in statute law the intention of the Legislature is the main factor,

(5) Lastly the customs and usages must be antique, certain and reasonable.

Jaimini treats of the Smriti or customary law in the *third chapter of the first book* and his treatment is the same as that of the English system referred to above.

Jaimini's treatment of Smriti & Usage law.

Though some of the Smriti texts and even some texts of the digest-writers took the position of the Vedic Law in point of authority to be interpreted by the principles of construction of the Divine Statute Law, yet Jaimini treated them as customary Law. He treats the Smriti and the Usages on one and the same basis.

The following principles of interpretation relate to cases of apparent or real conflict of legal doctrines; the undermentioned texts touch but a fringe of the subject of interpretation and are reproduced below :—

Principles of interpretation in Smriti.

1. "When two Smriti's disagree, that which follows equity as practised by the people of old, should prevail. Smriti is of greater authority than rules of Artha-Sastra (equitable principles based on rules of morality and prudence." (Yajnavalkya II. 21.)

श्रुत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः ।

अर्थशास्त्राच्च बलवद्धर्मशास्त्रमिति स्थितिः ॥

2. "Avoiding carefully the violation of either the sacred law or the rules of Artha Sastra, he should conduct the trial attentively and skilfully." (Narada I. 39.)

धर्मशास्त्रार्थशास्त्राभ्यामविरोधेन यत्नतः ।

संपश्यमानो निपुणं व्यवहारगतिं नयेत् ॥

3. "Where the rules of sacred law and the rules of Artha-Sastra are at variance, he must discard the latter and follow the rules of sacred law." (Narada I. 39.)

यत्र विप्रतिपत्तिः स्याद्धर्मशास्त्रार्थशास्त्रयोः ।

अर्थशास्त्रोक्तमुत्सृज्य धर्मशास्त्रोक्तमाचरेत् ॥

4 "In case of conflict of Smritis, decision should be based on reason. Custom is powerful and overrules the sacred law " (Narada I. 40.)

धर्मशास्त्रविरोधे तु युक्तियुक्तो विधिः स्मृतः ।

व्यवहारो हि बलवान् धर्मस्तेनावहीयते ॥

5. "The first rank (among legislators) belongs to Manu, because he has embodied the essence of the Veda in his work; that Smriti (or text of law) which is opposed to the tenor of the laws of Manu is

not approved." (Vrihaspati.)

वेदार्थोपनिबन्धत्वात् प्राधान्यं हि मनोः स्मृतम् ।

मन्वर्थविपरीतायाः सा स्मृतिर्न प्रशस्यते ॥

6. "Decision should not be based only on the Sastras By an unreasonable judgment there is loss of Dharma." (Vrihaspati)

केवलं शास्त्रमाश्रित्य न कर्तव्यो हि निर्णयः ।

युक्तिहीने विचारे तु धर्महानिः प्रजायते ॥

7. "The law of Manu is authoritative in the Satya Yuga, the law of Gautama in the Treta, in the Dwapara Sankha-Liklita, and in the Kali the Law of Parasara." (Parasara I. 24)

कृते तु मानवा धर्मास्त्रेतायां गौतमाः स्मृताः ।

द्वापरे शङ्खलिखिताः कलौ पराशराः स्मृताः ॥

8. "When there is a conflict between the Veda and the Smriti and the Purana, the Veda should prevail ; (as between the two latter) Smriti is superior."

श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते ।

तत्र श्रौतं प्रमाणन्तु तयोर्बैधे स्मृतिर्वरा ॥

The following general rules, which specifically bear on the character and interpretation of the Smriti texts and usages, form the basis and lie at the root of the subject of interpreting the Hindu Law. The seven rules as contained in Book I, chapter III Adhikaranas 2, 3, 4, 6, 7, 8 and 9 of Jaimini are given below :

1. "The authoritative nature of the Smriti law is a matter of inference, because the promulgators of it are the same as those of the Vedas." [Jaimini I. iii. 2.]

2. "If there be a direct conflict between a Smriti text and a Vedic text, the latter must prevail." [I. iii. 3.]

3. "If a Smriti text is based on a gross motive which is inconsistent with the spiritual motive of the Vedic law, then it is to be ignored " [I. iii. 4.]

4. "Established and approved usage has the force of law without reference to the causes which brought it into existence," [I. iii. 7.]

5. "If there be two conflicting usages, that which has the support of the Sastra is to prevail." [I. iii. 9.]

6. "A rule of usage or a rule of Smriti must be taken to represent the short, simple and general proposition, such as, a Vedic Vidhi " [I. iii. 8.]

7. "Authorized terms and expressions belonging to foreign

(*Mlechchha*) dialects are to be taken in the sense attached to them according to those dialects " [I. iii. 6.]

Seven principles of construction of Smṛiti and Usage law.

These seven principles of construction of Smṛiti and Usage law may be put in the form of maxims thus:—

I. *Smṛiti-pramānyadhikarāṇa*—The Smṛiti is presumed to be authoritative and binding.

II. *Smṛiti-prabalyadhikarāṇa*—In the event of conflict between Smṛiti and Smṛiti, the latter fails,

III. *Duṣṭānūlaka Smṛiti apramānyadhikarāṇa*—A Smṛiti text, the origin of which can be traced to perverse motives, is not binding.

IV. *Padārtha prabalyadhikarāṇa*—Usage has the force of law if not found to have originated in any perverse motive.

V. Between two conflicting usages (either as regards the application of word or in the matter of conduct) that which is conformable to the Sastra is to prevail.

VI. *Samāxya-Smṛiti-kalpanadhikarāṇa*—Usage or Smṛiti must be reduced to the short, simple and general form of a Vedic Vidhi.

VII. *Mlechchha-prasiddha-padārthadhikarāṇa*—An authorised matter expressed in foreign words must be understood in the sense that those words carry with the foreigners.

Sutras relating to these seven principles of construction.

"The first principle (which is the first Adhikarāṇa of the chapter) follows from the following two Sutras."

Objection: "Duty arises from the Vedic commands, all outside the Vedas must be disregarded." [I. iii. 1.]

धर्मस्य शब्दमूलत्वात् अशब्दमनपेक्षं स्यात् ।

Answer: 'The authoritativeness of the Smṛiti law is a matter of inference, because the promulgators of it are the same as those of the Vedas.' [I. iii. 2.]

अपि वा कर्तृसामान्यात् प्रमाणमनुमानं स्यात् ॥

The second principle is contained in the third Sutra of the chapter and forms the second Adhikarāṇa of it. (I. iii. 3.)

'A Smṛiti is, however, to be disregarded in case of conflict, the presumption in its favour arising in the absence (of conflict).'

विरोधेत्वनपेक्षं स्यात् असति ह्यनुमानम् ।

The third principle is worked out by commentators from the fourth Sutra of the chapter and is the third Adhikarāṇa of it. The Sutra runs as follows:

"(A Smṛiti is to be disregarded) also when an (improper) reason is seen." हेतुदर्शनाच्च । All the commentators agree in taking *hetu* (reason) to mean a *duslita hetu* (an improper reason).

The fourth principle is embodied according to some commentators in Sūtras 5, 6 and 7. But according to Kumārila Bhaṭṭa, Sūtras 5 and 6 form a separate Adhikarāṇa (topic). He maintains that Sūtra 7 alone embodies the principle stated under the fourth head. This Sūtra 7 is as follows :

"But usages not admitting of the (vitiating) cause (*viz.*, perverse motive) prevail."

अप्रिवा कारणान्नह्यो प्रयुक्तानि प्रतीयेरन् ।

Kumārila Bhaṭṭa's view will be fully stated later on.

The fifth principle, regarding conflicting usages is properly the subject of Sūtras 8 and 9 and forms the fifth Adhikarāṇa of the chapter.

Objection: 'In them (usages) no marks of contradiction (to Śruti) being visible, they would be of equal force and capable of conflict (with each other)."

तेष्वदर्शनाद्विरोधस्य समाधिप्रतिपत्तिः स्यात् ।

Answer: "(Then such as are found) in the Śāstra as auxiliary to it must prevail."

शास्त्रस्था वा तन्निमित्तत्वात् ।

The sixth principle which is the subject of the eighth Adhikarāṇa is introduced by the 15th Sūtra affirmed as Sūtra 16 and is discussed at length by Sūtras 17 to 23.

Sūtras 15 and 16 are as follows :

Objection: "As an inference is to be made, then all that has to be done is to join the inference to make anything authoritative."

अनुमानव्यवस्थानात्तत्संयुक्तं प्रमाणं स्यात् ।

Answer: "But a duty must be general, and the following of that characteristic (of being general), is fit for the rule of law (to be formulated)."

The seventh principle forming the sixth Adhikarāṇa is deduced from Sūtra 10 of the chapter, as already stated. It runs as follows :

"Matters incidentally authorised hold good in the absence of any indication to the contrary,"

चोदितन्तु प्रतीयेताविरोधात् प्रमाणेन ।

Commentators take it as referring to foreign words and foreign usages, apparently because the Sūtra would otherwise be useless For,

matters incidentally authorised, if not of an exceptional character, must hold good even without such a Sutra.

The above are the Sutras in which the seven rules affecting the interpretation of Smritis and Usages are contained (o).

"The *Smṛiti pramāṇya* maxim corresponds to the idea that a rule of law is taken to be authoritative on the presumption that it must have been recognized by those who had legislative authority. The *Sūtra-prabalya* maxim corresponds to the principle that if a decision or dictum is contrary to the express law of a statutory nature, the latter overrides the former. The *Dustamlaka-Smṛiti-apramāṇya-adhikarāṇa* corresponds to the rule that an usage or custom must be reasonable in order to be accepted as law. The *Padārtha-prabalya-adhikarāṇa* tallies with the maxim "usage is the text of interpreter." The *Sāstra-prasiddha-padārtha-adhikarāṇa* and the *Mlechchha-prasiddha adhikarāṇa* are no doubt of a special character, but they are reasonable and proper. *Smṛiti-samānya-adhikarāṇa* virtually corresponds to the principle that an usage is valid in so far as it is clear and certain."

Equivalent modern principles relating to these 7 rules.

SECTION 2. AUTHORITATIVE NATURE OF SMRITIS PRESUMED

The Smṛiti is presumed to be authoritative and binding. The Sutras relating to this first rule, as given above, provide the reason for the authoritativeness of the Smritis, "because the promulgators of the Smritis are the same as those of the Sruti." The better reason would have been the supposed one that every Smṛiti text is only a reproduction of some lost Sruti text. Whatever the reason may be, a Smṛiti text is supposed to have its origin in Vedic principles. In other words, Hindu Civil Law has been made dependent upon religious injunctions. This is not peculiar to the Hindu system of law alone but is the common feature of all ancient and also of some modern communities. In the infancy of society the governing power rested generally with the priests and the people and not in any monarchical institution. The people were naturally guided by their elders or leaders who were mostly the priests. The elders combining their priestly functions, were called patriarchs. The Rig Veda clearly exhibits this patriarchal system of the Indo-Aryans (the Hindus). The Vedic Rishis were mostly *Prajāpatis* or patriarchs. The impress of the ancient Vedic patriarchs, Manu, Atri, Angiras, etc., is still found in the institutes of Hindu Law. So Jaimini lays down that the authoritativeness of these institutes is a

Vedic origin of Smṛiti.

(o) K. L. Sarkar, 227-230.

matter of inference, as they were promulgated by the Rishis of the Vedas.

"The above is clearly exhibited by the Vedas, specially, the Rig Veda. The highest aspirations and the highest ideals of a nation are embodied in its religion. Therefore, a rule of conduct which is associated with religion and has the sanction of it, more effectively sways the conscience of individuals in the shape of positive law, than it otherwise would do. As Rishi Jaimini understands the Vedas, the pith and marrow of them is the command requiring man to seek heavenly bliss and heavenly purity. To have the Vedas as representing this command at the top of the civil law is a great benefit to such law Although in early stages of society religion is mixed up with civil law, there is a gradual tendency of the civil law being disintegrated from the religious law. And this is shown clearly by the history of the Hindu Law. When Jaimini wrote or pronounced the Aphorisms, there had been a partial disintegration to some extent, but the civil law was yet dependent on the religious law in a great measure. Later on, when the Nibandhas (the digests) were written, such as the Mitakshara and the Dayabhaga, the disintegration had been almost complete. But up to the present time it is not fully complete, nor is it desirable that it should be so. For the reverence to the Vedic command 'Thou shalt aspire for a heavenly life,' however weak or theoretical it may have become, is sure to have some influence in the proper development of the Hindu Law." (p)

SECTION 3. VEDIC TEXTS MORE AUTHORITATIVE THAN SMRITI TEXT

In case of conflict between a Smṛiti text and a Vedic text, the latter should prevail :

This rule is of little practical importance, as the Vedas contain very little of positive law, and the chances of collusion between the Smṛiti and the Vedic text are very rare. But still some do exist, specially as regards Achara law (rule of individual conduct and religious ceremonies).

Oudāmbārī Nyaya illustrating the conflict. Oudāmbārī Nyaya illustrates such a conflict between a text of Katyayana Smṛiti and a Vedic text. The conflict as regards positive civil law is sometimes noticeable, e.g., several Smṛiti texts have declared that in cases of partition among the brothers, the elder brother is to get a larger share than the younger. There is a Vedic text that Manu divided his property among his sons in equal shares. The influence of the Vedic text prevailed, and the law is that all brothers get equal shares in their paternal property.

The Mimansa Aphorisms have not touched this point of conflict between the Smritis and the Puranas. Some of the Smriti writers acknowledge the Puranas as a factor of civil law. For example, Vyasa says, "where there is a conflict between the Sruti, the Smriti and the Puranas, the Sruti must prevail; but in a conflict between the latter two, the Smriti must prevail."

Conflict between Smriti and Puranas.

श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते ।

तत्र श्रौतं प्रमाणम् तयोर्द्वे स्मृतिर्वरा ॥

The general Mimansa rule that usage has the force of law gives the true position of the Puranas in the domain of positive Civil law. Puranas are ancient records of certain usages, and as such they ought to be consulted in connection with such usages. Says Professor Wilson :

"The Puranas are not authorities in law, they may be received in explanation or illustration, but not in proof."

स्मृतेर्वेदे विरोधे तु परित्यागः यथा भवेत् ।

तथैव लौकिकं वाक्यं स्मृतिर्वाधे परित्यजेत् ॥

The proposition as laid down by Vyasa that in case of a conflict between the Smriti and the Puranas, the former prevails, is unquestionable. But this must be subject to the rule relating to the superiority of usages and customs contained in the Puranas.

SECTION 4. SMRITIS BASED ON PERVERSE MOTIVE

The authority of the Smriti is vitiated if based on a perverse motive :

The Sutra relating to this rule, as given above, does not contain any word signifying perversity but speaks of motive only. This, in fact, would be giving it a wider sense, if it meant that wherever the statement of a reason was found in a Smriti text, that text would not be regarded as a Vidhi. V. N. Mandlik took such a wide view of the Sutra. He says as regards the text of Vasishtha, "But no one should give or receive an only son, for he saves the man (from *put* पुत् or hell).

"This text on the most approved principles of criticism must also be treated as a recommendatory one, in as much as it contains a precept that is intended for a certain specified purpose. It is a rule of the Purva Mimansa that all texts supported by the assigning of a reason are to be deemed not as Vidhi but simply as Arthavada ; so it follows

Mandlik's wide view.

that it has no obligatory force whatever. He adds :

"Savara Swami constructs an Adhikarana (a topic) on this head, which he calls *Hetubannigadadhikarana* (a topic in regard to texts which contain a clause containing the reason of the precept) out of five Sutras of Jaimini. Ch. I, quarter II, 26-30 " He further says :

"This principle is made still clearer by Savara Swami in his comments on Jaimini's Sutra 4 of Ch. I, quarter III." (x). In the Full

Savara Swami and other commentators do not take such wide view. Bench case of the Allahabad High Court: *Beni Prasad v. Hardai Bibi* (y), the broad view of this Sutra as taken by Mandlik was approved. But the comments of Savara Swami and other commentators

who followed him, are to the effect that the Sutra should be construed as laying down that when some selfish design is found to underlie a Sruti text, its authority should be ignored. They are all unanimous

that the Sutra in question has in view the Smriti text relating to *Visarjana-homa*. The meaning

of the text is that a priest called *Adhvaryu* takes a piece of cloth connected with a sacrifice called *Visarjana-homa*, and it is enjoined that the cloth should be long enough to cover the whole post. The commentators observe that the reason of this last text is to accommodate the *Adhvaryu* priest by supplying him with a long piece of cloth वैसर्जहोमोयं वासोऽध्वर्युं गृह्णाति । So it is argued by them that selfish motive being seen, there can be no presumption in favour of the Smriti text in question. Madhavacharya has put this in very clear

terms in his Nyaya. The Nyaya, therefore, does not mean that when a reason is attached to a Smriti text, it is invalidated, but that where an unworthy selfish motive is detected to lie at the bottom, then

alone no presumption should be made in favour of its validity, or, in other words, in favour of its being consistent with the Vedas. The logic of this principle is evident. The sanction of the Vedic obligatory texts is the Apurva sanction of securing heavenly purity. When a selfish motive is the cause of a rule, that rule cannot be in consonance with this high ideal. Hence such a rule must fail.

"Kumarila Bhatta takes the expression "*Hetudarshanat*" to mean, from seeing a fundamental reason different from the fundamental reason of the Vedic Vidhis, viz, the attainment of heavenly bliss.

इतश्च न प्रमाणत्वं मूलहेत्वन्तरे क्षणात् ।

व्यभिचारे हि नोत्पत्तिरर्थापत्त्यनुमानयोः ॥

(x) Mandlik's Hindu Law p. 499.

(y) 24 All. 67.

"Any Vidhi in order to be valid must have directly or indirectly this object in view. Bhatta says that this is not the case in texts grounded on considerations of error, covetousness and plausible argument which even the highest intelligence cannot prevent."

कश्चित् भ्रान्तिः कश्चित्लोभः कश्चिद्युक्तिविकल्पनम् ।

प्रतिभाकारणत्वेन निराकर्तुं न शक्यते ॥

SECTION 5. AUTHORITY OF USAGE UNINFLUENCED BY IMPROPER CAUSE OF PERVERSE MOTIVE

An usage holds good if not influenced by any improper cause or perverse motive :

This proposition is covered by the *Padārtha Prabalya Adhikarana*. *Padārtha* is an established thing or established fact. Usage also is an established fact. A usage is not properly a usage, unless it be an established fact. So the *Adhikarana* well expresses the principle enunciated, the constituents of which have been given in the three following Sutas :—

"Non-contradiction lies in non-condemnation by the wise : is that your position ?" शिष्टाकोपेऽविरुद्धम् । [Jaimini I. iii. 5].

"Not that, because there are the limits of the Sastras." न शास्त्रपरिमाणत्वात् । [Jaimini I. iii. 6].

"But the thing is, cause not accruing, a usage is to hold good." अपि वा कारणग्रहणे प्रयुक्तानिप्रतीयेरन् । [Jaimini I. iii. 7].

"Savara Swami takes all the above three Sutas together as forming one topic (*Adhikarana*). According to him the proposition in the first Suta, 'Non-contradiction lies in non-condemnation by the wise' is thrown out as the suggestion of the sound conclusion on the subject, which is formally enunciated in the concluding proposition, *viz.*, 'no (improper) cause accruing, a usage holds good.' Thus, according to this view the intermediate Suta: 'Not so, because there are the limits of the Sastras' embodies an objection (*Purva paksha*), which is refuted. The sense of the whole, according to this view is this : Says the objector, 'You cannot in your zeal to uphold matters outside the Vedas (*ashabda*) go so far as to say that the mere fact of a want of positive condemnation by well-informed personages is enough to enable you to take a thing to be not contradicted by the Vedas, and therefore fit to be presumed as valid.' The objector continues, 'No, certainly you cannot hold so, because where then will be the rules of your Sastra prescribing this and that limit?' To this the affirming side answers: 'Well, there may be the limits of the Sastra to the

**Savara Swami's
view of the
Sutas.**

contrary, but when a usage has become a settled fact, it must hold good if no improper cause is found at the bottom of it."

This is the logical effect of Savara Swami's view of the Sūtras. He gives an illustration, The Vedas have it: "Make the Vēdi and then recite the Vedas" वेदं कृत्वा वेदिं करोति । An usage has sprung up of performing *Achmana* (sipping water with suppressed breath) between the act of making the Vēdi and of reciting the Vedas. No doubt it contravenes the rule of procedure as given in the Vedas, but it cannot be discarded. This illustration narrowed down the broad proposition in favour of usage. It does not throw any light on the broad features of the rule and proceeds upon the supposition that usage must be one necessitated by Sastric or religious considerations; and all that is meant by overruling the objection which requires a usage to be within the limits of the Sastras is, that when such limits are only in the nature of rules of procedure, they are to be ignored in favour of usages of a substantive character.

Kumarila Bhatta realising that the illustration would whittle down the rule formulated by Savara Swami explained the three Sūtras thus. He maintains that the first two Sūtras form one topic—the topic of religious or ceremonial usages, and that the last Sūtra forms by itself a separate topic relating to worldly usages. He says "the first one is the refuted objector (*Purva paksha*) and the second is the final conclusion" (*Siddhanta*). According to him the objector suggests that religious practices and doctrines not condemned by the Buddha teachers should prevail; that against this contention the affirmative side maintains that Buddha practices and doctrines though not condemned by the wise cannot hold good, because they are not within the limits of the Vedas. Having thus safeguarded the rules of religious practices, Bhatta unhesitatingly affirms that the object of the third Sūtra is freely to allow worldly usages affecting business, subject only to the limitation laid down by the *Drishtamulaka Adhikarana*, *vis.*, that a gross or perverse motive, such as covetousness and the like, vitiates a text. At the first sight it appears to be a stretch of language to understand the words '*Karana-grahana*' (not taking cause) to mean not presenting any improper cause. But all the commentators have taken it in such a sense, so that there cannot be any question about it. How and wherein Bhatta differs from Swami is stated by Pandit Rameshwar Suri the author of the *Subodhini Vritti* in his note to the 7th Sūtra, Chapter III, Book I [p. 243.]

"The Pandit in the said note first explains the reason why a usage

Rameshwara Suri explains the difference.

is taken to be authoritative. The reason suggested is indeed a subtle one. It is said that the validity of an established usage (*Prasidha padartha*) requires no proof, because proof is necessary only of that which seeks recognition. That which has been recognised needs no proof."

प्रमेय गत विरोधलोचनैव प्रमाणविरोधबुद्धेरुद्येन प्रमेयविरोधावगम-
काले एव तयोर्बलावलस्याप्यवगमात्त पथनिर्णये प्रमाणबलावलस्येव नैराकां-
क्षेनाऽनादरणीयत्वात् ।

The note proceeds: "In this matter the Vartikkara (Bhatta) has constructed the Adhikarana differently, as the Purvapaksha assumed in the Bhashya (Savara) is not proper. The first of the Sutas is not a part of the conclusion, but is the Purvapaksha against the view that such of the sayings of Sakya (Buddha Deva) as are not disapproved by the wise should be accepted as authoritative. According to Kumarila the next Sutra "that cannot be because there are limits of the Sastra "is the *Siddhanta* (conclusion.)"

अत्र वार्तिककारोऽन्यथा अधिकरणमारचयतिस्म भाष्योक्तपूर्वपक्षस्याति-
मन्दत्वात् । शास्त्रोक्ताऽहिंसादिवचनं प्रमाणमप्रमाणं वेति संशये शिष्टा
कोपेऽविरुद्धमिति चेदिति पूर्वपक्ष सूत्रम् । अस्यार्थः । शिष्टस्य श्रुतिस्मृति-
विहितस्य प्रकोपे व्याकोपाभावे अविरुद्धं तत् प्रमाणं भवत्विति । सिद्धान्तयति
न शास्त्रपरिमाणत्वादिति ।

Pandit Rameshwara Suri after giving some illustrations of the above position, from Bhatta's work proceeds to explain Bhatta's view of the 7th Sutra '*aprvakarana etc.*' as follows:

'This Sutra '*aprvakarana etc.*' is an independent Adhikarana to establish the validity of *sadachara* (unobjectionable usages), the other side having denied the validity of each."

Seventh Sutra establishes the validity of usage

अपि वा कारणाग्रहणे प्रयुक्तानि प्रतीयेरन् । इति सूत्रं तु सदाचार प्रामाण्यबो-
धनार्थमधिकरणान्तरत्वेन व्याख्यातवान् । सदाचारोऽप्रमाण प्रमाणं वेति संशये ।

The validity of these is established subject to the condition that they are not vitiated by motives directed against the general religious sense of the Aryas, this condition being implied by the words *Ka anagrahane* (not admitting of such motives *etc. etc.*)

This is Pandit Rameshwara's explanation of Bhatta's view. In the very words of Bhatta, it may also be considered. He first shows that even sound rules of conduct embodied in Buddha books cannot

be accepted by reason of the Adhikarana. There he says :

"If the purpose of these rules of conduct can be clearly made out by some other Sastra of our own, then being so made out, those inferior Baudha Sastras become useless." Then Bhatta proceeds; "Therefore, teachings outside those expressly contained in the Vedas and the like cannot be disregarded as unproved; hence the Sutra "*Apriva karanagrahana etc.*" [Tantravartika, Benares Ed. p. 127.]

यदा शास्त्रान्तरेणैव सोऽर्थः स्पष्टोऽवधार्यते ।

तदा तेनैव सिद्धत्वादितरस्यादनर्थकम् ॥

तस्माद्यावत्परिणित वेदादिशास्त्रव्यतिरिक्त निबन्धनतद्धर्मप्रमाणत्वेन नापेक्षितव्यमिति । यत्स्वेतदपि वा कारणाग्रहणे प्रयुक्तानि प्रतीयेरन्निति सूत्रम् । *

"He next explains that the doubt (*Purvapaksha*) of this Adhikarana is, whether usages in order to be valid should be usages observed by the well-informed (*Shishtachara*). In the course of this discussion Bhatta enumerates a series of acts recorded in the Puranas and the Mahabharata, of heroes and persons of a sacred character, which are manifestly improper and unfit to be followed. [See Tantravartika p. 128]. They are intelligible only by referring to special and exceptional circumstances "

Reviewing these matters he observes :—

"Who are well-informed?—Those whose actions are sound."

"Then whose actions are sound? Those who are well-informed."

"This leaves us where we were." [Tantravartika p. 128.]

के शिष्टा ये सदाचाराः सदाचाराश्च तत्कृताः ।

इतीतरेतराधीननिर्णयत्वादनिर्णयः ॥

He then examines whether the theory of conscious satisfaction (*atma tusti*) can be taken as a test of the soundness of practice. He says that although Manu mentions conscious satisfaction as a test, others deny it.

सदाचारप्रमाणत्वं मन्वादिभिरपि स्मृतम् ।

आत्मतुष्टिः स्मृताऽन्या तैर्द्धर्मैः सा चानवस्थिता ॥

He himself shows that conscious satisfaction is not a reliable test.

कस्यचिज्जायते तुष्टिरशुभेऽपि कर्मणि ।

He solves the difficulty as follows :—

The word '*Karanagrahana*' indicates that a usage should be free from the imputation of being of other than a Vedic origin in which the desire for heavenly bliss is at the bottom. Therefore, the word

'*Karanagrahana*' must not only mean the absence of non-Vedic and improper motives, but that it also means that the acts forming the use must be such that a true believer in the Vedas would perform as a matter of duty. [Tantravartika p. 133]

तथाचारात्मनुष्ठयादि धर्म्यं धर्ममयात्मनाम् ।

वेदोक्तमिति निश्चित्य ग्राह्यं धर्मबुभुक्षुभिरिति ॥

The question which has mainly engaged the attention of the commentators with reference to this Adhikarana is not whether a usage directly contradictory to the Vedas or the established Smritis can pass for good law; for when this is the case the usage must be disregarded. The question which has been discussed in this Adhikarana is, whether constructively a usage is to be held as not contradictory to the Vedas, simply because not condemned anywhere; or in order to presume non-contradiction the usage must be positively recommended somewhere. Kumarila

Usage is valid if recommended somewhere.

Bhatta inclines to the view that there should be an indication of a recommendation in some shape or other. But if the three Sutras be construed together as is done by Savara Swami—then this is not necessary; a mere absence of *Kōpa* (condemnation) on the part of informed and good men is enough, Bhatta accepts this view as an alternative. He says: "If the three Sutras be taken to form this Adhikarana, then with an eye to the *Shishtachara* (practices of the wise) of the Aryavarta, doubts as to validity or invalidity thereof having arisen, the author suggests that the absence of condemnation by the wise should be the test. Then the matter stands thus."

यद्वा सूत्रत्रयेनापि एतदेवाधिकरणं व्याख्यातव्यम् । इहाभ्यावर्त्तनिवासि-
शिष्टाचारानेवोदाहृत्य पूर्ववत् प्रामाण्याप्रामाण्य संदेहे शिष्टाकोपेऽ विरुद्धमिति
सिद्धान्तस्तावदुपक्रम्यते ।

"The *Shishṭa* (wise teaching) of Sruti and Smṛiti is that which is not contradicted by these latter,

"Such teaching has an authoritative character,

"If such wise teaching go against, then the validity is negatived,

"If it (*Shishṭa*) be indifferent (wanting in condemnation), then too usage is not invalidated thereby." (Tantravartika p. 145.)

शिष्टं यावत् भुतिस्मृत्योस्तेन यन्न विरुध्यते ।

तच्छिष्टाचरणं धर्मं प्रमाणत्वेन गम्यते ।

यदि शिष्टस्य कोपः स्याद्विरुध्येत प्रमाणात्ता ।

तदकोपात्तु नाचारप्रमाणात्वं विरुध्यते ॥

Thus Bhatta admits that it is not essential for the validity of a usage that the Sruti and Smriti must have approved it positively. It is sufficient if they do not condemn it.

Usage valid in the absence of non-condemnation by the wise.

Colebrooke says about this Adhikarana :—

“Usage generally prevalent among good men and by them practised, as understanding it to be enjoined and therefore incumbent on them, is mediately, but not directly, evidence of duty ; but it is not valid, if it be contrary to an express text. From the modern prevalence of any usage, there arises a presumption of a correspondent injunction by a holy personage who remembered a revelation to the same effect. Thus usage presumes a *recollection*, which again presupposes revelation. Authors, however, have admitted particulars sanctioning good customs in general terms: but any usage which is inconsistent with a recorded recollection is not to be practised, so long as no express text of scripture is found to support it.” (x)

The question now arises as to what is condemnation by the Sruti and Smriti? A usage is contradicted by the Sruti only when it is contradicted by any obligatory text. Arthavadas and the like such as Pratipattikarma in the Sruti or the Smriti, opposed to a usage, cannot be said to contradict it.

Arthavada or Pratipattikarma (incidental acts) or the like which are not Vidhis or obligatory texts in the Srutis or the Smritis do not contradict a usage if opposed to it. Usages springing up in supersession of such matters cannot be regarded as in contravention of the Sruti and are perfectly valid. Brihatnara-diya Purana has mentioned a number of such matters which, though permitted by the sacred books, have been superseded by the practice of the Kali Yuga. This Adhikarana also supplies one of the means of determining between the authority of one Smriti text and another which may be in conflict with each other. In such a case, if the rule contained in one of the texts is found to be in actual operation as a matter of usage and the other to be out of use, the former will prevail.

The doctrine of *factum valet* as laid down by Dayabhaga, and the doctrine of *vox populi* as given out by Yajnavalkya and emphasised by the Mitakshara, deserve examination. It is worth observing that Jaimini's maxims regarding the force of usage (called facts) very largely apply to matters of quasi-law, which are said to be Manushya Dharma (social duties) and Pratipattikarma (incidental duties). In respect of such matters, usages springing up in supersession

of old rules can be easily given effect to. These rules are of the nature of moral rules or rules of prudence. They must yield to force of usage recognised by the positive law on the one hand and to the general public opinion on the other. The Padarthapravalya Nyaya and the Holaka Nyaya have been mostly used by digest writers in this connection.

SECTION 6. PREFERENCE OF MATTERS SANCTIONED BY SASTRAS

Matters sanctioned by the Sastras should have preference (x):

"The Adhikarana शास्त्रप्रतिद्वपदार्थप्रमाण्याधिकरणम् (Jaimini I. (iii. 5) is very narrowly put by the commentators as bearing on the limited question of verbal usages. But we shall find that the two Sutras of this Adhikarana are in continuation of the topic of the last Adhikarana, which deals with the subject of usages in general. As the preceding Adhikarana in general covers questions of the customary sense of words as well as customs and usages regarding conduct, so this Adhikarana relates to conflicts of usages in general including the question of conflict of verbal usages as well as conflict of usages regarding civil life. Kumarila Bhattacharya, no doubt, discusses the questions of conflicting verbal usages under this Adhikarana. [Tantravartika p. 145.]

एकशब्दमनेकार्थं शिष्टैराचर्यते यदा ।

विगानेन तदा तत्र कोऽर्थः स्यात्पारमार्थिकः ॥

But he maintains the wide character of the rule as including usages in general. He supports the rule by the following arguments: "Smṛiti and usage conflicting, doubt arises as to whether they are co-ordinate or unequal. To regard them as co-ordinate would create confusion, although they are traceable to a common source (the Sruti)" [Tantravartika p. 150.]

स्मृत्याचारविरोधे वा साम्यवैषम्यसंशये ।

समाविप्रतिपत्तिः स्यान्मूलसाम्यादयोरपि ॥

"So I have enunciated the rule as follows: 'Between two conflicting usages (verbal or otherwise) that which conforms to the Sastra is to prevail.' " (x)

The Sutra introducing the Adhikarana as by an opponent runs thus :—

'If in them (facts established by usage) no disagreement be observed (with the Vedas), this would give rise to the confusion of

co-ordinates.' [Jaimini I. iii. 8]

तेष्वदर्शनाद्विरोधस्य साम्यं विप्रतिपत्तिः स्यात् ।

The meaning of this is that, if you accept the principle of every fact established by usage to be valid on the supposition of being consonant to the Vedas, then all such facts will be in a co-ordinate position with equal weight, and in that case you will find it difficult to discriminate between them, if there be conflict among them. The answer is given as follows :

"(There will be no difficulty in preferring one to another by considering) which of them is found in the Sastra or is borne out by its principles [Jaimini I. iii. 9] **शास्त्रस्था वा तन्निमित्त्वात् ।** The meaning is, that in case of conflict between two usages, that one which is found in the Sastra or is conformable to it should prevail. You will observe, however, that a usage wholly outside the limits of a Sastra would be perfectly valid by the preceding Adhikarana, if there be no other usage in rivalry to it. The consideration of Sastra comes in where there is more than one usage on the same matter and in the same locality. In the same locality and with regard to the same community, two conflicting usages should not be tolerated. One of them must be eliminated by the aid of the Sastra. But, on the same matter there may be two different usages in two different localities or with regard to two different communities. Jaimini would not regard these differences as conflicts. That in such a case there is no conflict but merely difference of application, is shown by Jaimini in Chapter IV of the second Book, beginning with Sutra 8. In these Sutras, he makes out that the different practices of the different *Shakhas* are merely different applications of the same Vidhi. Kumarila concludes his discussions on this topic by the observation that, in order to determine whether a usage is in accordance with the Sruti, the secondary means of proof should not be disregarded, such as figurative sense, splitting of sense, *etc.* He also says that in cases of doubt the benefit of the doubt should be given in favour of the usage which savours of a Vedic character." [Tantravartika p. 156.]

किं वाययवविक्षेपजननात् सैत्रं दुर्बला ।

एवं नानोपपत्तिर्वात् सन्वेहे तावदुच्यते ॥

निरुक्तस्याक्रियाद्वारा प्रतिपत्तिर्बलीयसी ।

शास्त्रस्था वेत्यनेनासौ कल्प्यापि हि बलीयसी॥

"If both the *Vedic* conclusion and *Laukika* (popular) conclusion be clear and self-evident, the former prevails without saying. Therefore, that conclusion which is arrived at by Sastric materials alone is

superior and cannot be placed on the same footing with usages of a restricted, far-fetched and mixed character." [Ibid p. 155]

लौकिकी प्रतिपत्तिर्हि, स्वार्थे निः संशया स्थिता ।
 वैदिक्यपि तथा स्वार्थे, बाधतेऽतो विपर्ययात् ॥
 तस्मान्छास्त्रस्थितैवैका, प्रतिपत्तिर्बलीयसी ।
 न समामुक्तकाचारैर्विप्रकृष्टैः ससङ्करैः ॥

SECTION 7. REDUCTION OF SMRITI TO THE FORM OF A SIMPLE VEDIC VIDHI

A usage or Smṛiti must be reduced to the short, simple and general form of a Vedic Vidhi :

The validity of usages is generally established by the *Padarthaprabalya* Adhikarana, if not influenced by any perverse motive or improper cause. The *Sastra-prasidha padartha* Adhikarana lays down that in case of conflict between usages, that which conforms to the Sastra is to prevail. Usages, in some cases, are often confined, to a certain class of people or obtain only in particular parts of the country, or, in other words, they may be tribal or local. In case they are not in conflict with Sruti, a presumption is to be made in favour of their validity. The difficulty arises as to how this presumption is to be made. If they relate to particular sections of the people or to particular regions only, should the rules to be presumed be in a particularised and limited shape? This sixth principle solves this difficulty and lays down that the Vidhi to be presumed should be a simple and general one. Again, a difficult position arises that if a general Vidhi applicable to every place and to every people is to be presumed even when the usages are tribal or local, the effect will be to abolish tribal and local customs or usages. This difficulty also has been obviated by the Mimamsakas, who have kept in view the distinction between a general Vidhi embodying a general principle called Utpatti Vidhi, and Vidhis which provide the mode of application of such a general Vidhi to particular cases which are known as Vinīyoga or Prayoga Vidhis that are by their very nature local or tribal. Thus, a rule of law regarding any usage or custom is always enunciated in general terms but is left to be extended to any place or to any people.

The Samanya Sruti-kalpana or Holaka Nyaya may now be considered in this connection. Holaka means 'the spring festival' named *Holi*. The Sūtras composing this maxim may be treated first and then their effect may be considered. The Adhikarana begins with the suggestion of the objector, '(if a

presumption is necessary) a presumption co-extensive with the usage would do to make it authoritative [Jaimini I. iii. 15]. The objector means to say that if there be a usage for the Holi for the eastern part of India, it may be simply presumed that the Veda enjoins that the Holi festival should be performed in the east only.

The answer is: "No, a duty should be a duty of all men following (the well-known) characteristics of an injunction (to which it is to correspond)." [Jaimini I. iii. 16]

अपि वा सर्वधर्मः स्यात् तस्यायत्वात् विधानस्य ।

"The application of the injunction must be guided by the facts observed" [I. iii. 17]

दर्शनात् विनियोगः स्यात् ।

"It may be named after a particular place with which it may be associated." [I. iii. 19]

आख्याहि देश संयोगात् ।

"If you say that it cannot apply to another place," [I. iii. 20]

न स्यात् देशान्तरेषु इति चेत् ।

"Why not, a name is a name from association, just as one would say this is of Mathura." [I. iii. 21]

स्यात् योगाख्या हि माधुरवत् ।

"Again there is no modifying indication of the eternal Vidhi." [I. iii. 18]

लिङ्गभावाच्च नित्यस्य ।

"The act of duty has a direction as in the case of a sloping place." [I. iii. 22]

कर्मधर्मौ वा प्रवणवत् ।

"An act of duty remains the same by reason of duty being a virtue of the person." [I. iii. 28]

तुल्यं तु कर्तृधर्मेण ।

The inevitable conclusion of these Sutas is that where there is a local usage the presumption is not of the existence of a local Vidhi. The Vedas knew no local Vidhis. Owing to the universality of the Vedas, a general vidhi can only be presumed as not restricted to any place but capable of being applied locally. Even when the application is local, duty being a personal obligation, it follows the person wherever he goes,

A custom is never strictly local. It is in theory universal, but in practice and application it may belong to a particular family or to a particular place. As regards its restrictions to particular classes, they are of a changeable character. Colebrooke has given the views of Kumarila Bhatta in these words: "Nor are rituals and law-institutes confined to particular classes, though some are followed by particular persons preferably to others as Vasishtha by the Bahvrch Shakha of the Rik Veda; Gautama, by the Gobhiliya of the same Veda; Shankha and Likhita by Vajaseneyi; and Apastamba and Baudhayana by the Taittiriya of the Yajur Veda. There is no presumption of a restrictive revelation but of one of general import. The institutes of law and rituals of ceremonies, were composed by authors appertaining to particular shakhas, and by them taught to their fellows belonging to the same shakha and have continued current among the descendants of those to whom they were so taught." (z) [Tantravartika p. 179.]

पुराणमानवेतिहासव्यतिरिक्तगौतमवशिष्टशङ्खलिखितहारीतापस्तम्बबौधाय-
नादिप्रणीत धर्मशास्त्राणां गृह्यग्रन्थानां च प्रातिशाख्य लक्षणवत्प्रतिचरणं
पाठव्यवस्थोपलभ्यते । तद्यथा गौतमीयगोभिलीये छन्दोगैरेव च परिगृहीते ।
वाशिष्ठं बहुवृचैरेव शङ्खलिखितोक्तं च वाजसनेभिः । आपस्तम्बीय बौधायनीये
तैत्तिरीयैरेव प्रतिपन्ने इत्येवं तत्र तत्र गृह्यग्रन्थस्याभ्युपगमादि दर्शयित्वा
विचारयितव्यमिति ॥

Bhatta supports the conclusion of the Adhikarana by the Sarbadhikara Nyaya (the principle that every one is competent to perform a particular religious duty). [Ibid p. 185.]

तस्मात् सर्वाधिकारन्यायत्वादिधानस्य व्यवस्थितदेशाचारगृह्य धर्मसूत्र
निबद्धधर्माणामपि सर्वधर्मत्वम् ।

But according to Bhatta's own exposition of Padarthaprabalya Adhikarana (usage principle) usages validated by that Adhikarana are not religious duties but merely worldly duties. He says:

"In usages called *Acharya* (practice) reasons other than spiritual being seen, there is no Shastric evidence thereof; therefore.—there being the connection of wealth and pleasure there is no religious character in them." [Ibid. 143]

दृश्यमानान्यहेतुत्वात्नात्रशास्त्र प्रमाणता ।

तस्मादर्थं सुखाङ्गत्वाच्चाचारेष्वस्ति धर्मता ॥

The Holaka Nyaya relates to religious ceremonies.

"Therefore a local or tribal custom of a secular nature falls outside an Utpatti Vidhi, which must be universally applicable. The Adhikarana in question which lays down that a religious ceremony, which is customary in the east must be taken to be universal, relates to religious ceremonies. The Sutra which follows—*Nityasya alingavat नित्यस्य अलिङ्गवत्*—the eternal not having particular signs—shows that the Adhikarana does not apply to local or tribal customs and usages of a secular nature. In fact if the Adhikarana were intended to apply to local or tribal customs, the effect would be the abolition of all such customs by generalizing them. This would place the Mimansa Sastra in opposition to the Smritis, such as those of Manu, Yajnavalkya and others. But this is far from the intention of the Mimansakas. Kumarila Bhatta expressly refers to Manu and other Smritis to strengthen his position regarding the Padarthaprabalya maxim or the maxim recognizing the validity of local customs. Bhatta says: 'By the Smritikaras, among other things, it is admitted that whatever usage obtains among the good men of a place (it) is called *Sadachara* (sound usage).' "

साधूनां यस्मिन् देशे य आचारः स सदाचार उच्यते ।

Mimansakas thus recognise local or tribal customs in case of worldly matters but not in case of religious matters. According to the Holaka maxim, a local or tribal usage is not recognised by the Vedas, but only the general element in it is recognised. Jaimini's Sutras without invalidating local or tribal customs, do not encourage them. The reason is obvious as he wanted a uniformity in the doctrines prevalent in the Aryan community, specially in matters of religious practices. But as regards matters not purely religious, by the usage maxim, local or tribal customs which are not condemned by the wise are good, while those so condemned are invalid. Jaimini has denounced in toto the condemned practices, and has recognised or approved usages only. Manu enumerates all sorts of usages, approved or condemned. For example, as regards eight forms of marriages—two, Paishacha and Ashura, have been absolutely disapproved, three of them he approves, and others he practically treats as indifferent. Due to condemnation or indifference and even to other circumstances, the Brahma form only now prevails and the others have disappeared. In the same way as regards twelve kinds of sons, Manu disapproved of the last six kinds of them that were obsolete, and out of the remaining six, four more have gradually fallen into disuse. Thus even without the aid of Holaka maxim, undesirable customs gradually disappeared.

SECTION 8. FOREIGN WORDS BEAR THE USUAL SENSE OF THAT LANGUAGE

An authorized matter expressed in foreign words must be understood in the sense that those words bear in the foreign language:

The Sutras that were then framed show that the customary Law of the Indo-Aryans was of a homogeneous character. Little or no foreign practice had made its way into it at that time. They contemplate practices handed down from the purely Vedic age and also those which were approved or not disapproved by the *Shishta* (Aryans of light and learning) and do not refer to any question involving any foreign element. Savara Swami, however, reads some of the Sutras as exclusively relating to the Mlechchha language and Mlechchha usages (a). This Sutra does not in any way direct the sanction of the acceptance of foreign words or foreign practices according to the import attached by foreigners. Yet Savara Swami construed it in that way and used the word Mlechchha to indicate a foreign character. This word did not refer to the heterodox Buddhists but probably to the Greeks or the Scythians, as is evident from the illustrations given by him. It is, therefore, obvious that he flourished long before Lord Buddha.

Originally no foreign influence or civilization other than that of the Aryavarta had made any inroad upon the Indo-Aryans. But some foreign influence had affected the Brahman literature at the time Savara Swami wrote his commentary, though not in any aggressive form. Subsequently foreign influences became aggressive with the result that the Indo-Aryans became strongly conservative and began to cultivate a zealously national spirit. So Kumārila Bhaṭṭa condemns foreign usage and his attacks upon the Buddhas are very biting. In his discussion on the *Saṣṭra-prasiddha-padartha* Adhikarana, Bhaṭṭa says :

"It is foreign (Mlechchha expressions) that by false similarity to pure expressions produce error and weakness and thus lead to substantial delusions." [Tantravartika p. 149.]

यथा साध्वनुरूपत्वात् प्रमादाशक्तिर्ज्ञेयः ।

जायते वाचकभ्रान्तिस्तथैव म्लेच्छभाषिते ॥

In this Adhikarana the position is such that it is impossible to dispense with foreign words and their foreign meaning. This is explained by Bhaṭṭa. He introduces this Adhikarana by the following Sloka :

"Those words which are not current with the people of Aryavarta :

(a) Jaimini I. iii. 10.

whether such words should or should not be understood in the sense in which they are used by the Mlechchhas?" [Tantivartika p. 155.]

ये शब्दा न प्रसिद्धाः स्युरार्यावर्त्तनिवासिनाम् ।

तेषां म्लेच्छप्रसिद्धोऽर्थो प्राह्योनेति विचिन्त्यते ॥

"If by grammatical manipulations, following the Nirukta, a sense can be made, whether such sense should be preferred or the whole thing should be understood as it is understood by the Mlechchha?" [Ibid. p. 155]

निरुक्त व्याक्रियाद्वारा प्रसिद्धिः किं बलीयसी ।

समुदायप्रसिद्धिर्वा म्लेच्छस्य वाथवा भवेत् ॥

Later on he answers the above questions as follows :

"Expressing parts of sacrificial duty, corrupt Aryan words are distinctly found. Why then cannot such parts of duty be sanctioned in Mlechchha language? This holds good in the absence of any indication to the contrary. Thus the terms *Pika* and *Nema* and others like them are settled by the learned." [Ibid 158]

यत्तु वेद तदङ्गेषु पदं दृष्टमविमुतम् ।

म्लेच्छभाषासु तद्रूपमर्थे क्वचन चोदितम् ॥

तत् तथैव प्रतीयेत प्रमाणेनाविरोधतः ।

पिकनेमादि तद्व्ययं निपुणैरवधारितम् ॥

"*Choditam* means taught, or employed or incorporated into a transaction. Matters first settled by the Mlechchhas, were subsequently known by the Aryans or by those who knew both the languages." [Ibid. p. 158]

चोदितं ह्युपदिष्टं वा प्रयुक्तं वा क्रियागतम् ।

म्लेच्छैरवधृतं पश्चादायैर्द्वैभाषिकैः क्वचित् ॥

"The above clearly shows that the question is not simply a verbal one; it really relates to the adoption of Mlechchha usages as valid, when such usages are referred to in the Sastras. In fact the question of the meaning of the term *Pika* arises in connection with the usage of giving *dakshina* (present to the priest) of a black cuckoo. In the Sastra *Prasidha* *Adhikarana* terms are taken into consideration which have conflicting senses, one sense according to the definition of the Shastra, another according to vulgar or Mlechchha usage; for instance, the terms *Yava* (barley), *baraha* (a pig), have each a meaning according to the *Nirukta* (*Sastriik* terminology), but they also respectively mean *priyangu*, a particular weed other than *yava*, and *vayasa* a crow in some provincial

**Foreign usages
when valid.**

dialect. By the Adhikarana referred to, which lays down that in cases of conflict a Sastrik usage is to prevail over a popular usage, the words are taken as defined in the Shastras to the exclusion of the popular meanings thereof. But in the case of the *Pika* the word is foreign, and it has only one meaning; therefore, there is no help taking it in this meaning." (K. L. Sarkar p. 262)

Besides the seven general Adhikaranas regarding the Smriti and usage laws there are two other Adhikaranas called **Two other Adhikaranas.** the *Shadhrupada Prayuktaja* Adhikarana and *Lokavedayo Shabla Aikyata* Adhikarana including *Akrtishakti* Adhikarana, the former meaning the topic of the purity of language and the latter the topic of the identity of popular and Vedic terms. The principle of the former is that if vulgar terms occur wanting in precision of idea, pure words having a precise meaning which are equivalent to them should be substituted to make out their sense. For instance, *gavi*, *gouri*, *gopalika*, etc., used in relation to cows in various shades of meaning must be substituted by *gau*, which has a precise meaning. A number of words conveying the same idea cause confusion besides the loss of precision. Sri Bhatta Sankara explains that a multiplicity of synonyms is barred by a single appropriate term in these words :

"Many words are barred by one."

एकशब्देन अनेकशब्दं वाच्यते ।

The objector suggests : "As regards matters of common usage (*Prayoga*) the Sastras do not recognise their sacred origin (*utpatti*), therefore the words used therein follow no law." [Jaimini I. iii. 24]

प्रयोगोत्पत्त्य शास्त्रवाच्यशब्देषु न व्यवस्था स्यात् ।

The author answers : "(There must be some principle regarding such words) as all words proceed from human efforts, and, therefore, merit and demerit attach to them," [Jai. I. iii. 25.]

शब्दे प्रयत्ननिष्पत्तेरपराधस्य भागित्वम् ।

"Many words to signify one object are not proper." [Ibid. I. iii. 26]

अन्यायश्चानेकशब्दत्वम् ।

"In such cases (*i.e.* when there are many vulgar words indifferently applied to the same thing) the real meaning is made out only by special reference to rules." [Jai. I. iii. 27.]

तत्र तत्त्वमभियोगविशेषात् स्यात् ।

The result of this discussion is that the Sanskrit words must be given preference in construing popular sayings.

The other Adhikarana relates to the identity of sense of the same words occurring both in the sacred books and in popular language, and the principle laid down is that they are identical in sense only as regards the general denotation (*Akriti*). Bhatta Sankara reads this Adhikarana as stating that when a word has acquired various shades of meaning, it should be understood in its general sense which is one and the same, and briefly puts it thus :

“ A single sense bars many senses.”

अनेकार्थमेकार्थत्वेन बाध्यते ।

“In the phraseology of logic every word has a connotation and denotation. For instance, the word ‘cow’ connotes all varieties of cows; but it denotes a class (*Jati*) excluding all differences between one cow and another. In its connotation the word comprehends many a species of cows. In its denotation it only indicates an abstract idea common to all species ” (o)

Denotation is meant by *Akriti* and connotation by *Vyakti* by the Mimansakas. The *Akriti* Adhikarana is to the effect that one and the same word occurring in the Vedas and in popular language, agrees in meaning only in so far as the *Akriti* (the general sense) is concerned, and not in respect of *Vyakti* (special sense). The relevant Sūtras on this subject are :

The opponent says : “In the expressions of popular usage having the character of Vedic commands in every respect, the terms of the one must be identical in sense with the terms of the other.” [Jaimini I. iii. 30.]

Further he argues : “Because (generally) operative terms (*Shabdās*) do not necessitate the use of any particular thing.” [I. iii. 31] **अद्रव्यशब्दत्वात् ।**

“Yet sometimes it is seen that operative terms require the use of a particular thing.” [Jai. I. iii. 32] **अव्यदर्शनाच्च ।**

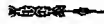
Thus the opponent says that terms of popular sayings must coincide in sense with the terms of the Vedas both as regards connotation as well as denotation. In other words, they are identical in every possible significance. The author says :

“No, they are identical only in general sense (*Akriti*) as simply indicating a class of acts.” [Jaimini I. iii. 33] **आकृतित्तु क्रियार्थत्वात् ।**

The sense is that in course of time a term of the Vedas might have acquired many peculiar additional meanings, but such terms must be taken only in a general sense and not in a special or particular sense

CHAPTER VII

APPLICATION OF MIMANSA RULES BY DIGEST WRITERS



SECTION I. INTRODUCTION

The Mimansa principle of Jaimini, *vis.*, 'Independently of any consideration of reason, that which has been in vogue must prevail.' has established the authority of customs and of digests and commentaries, such as, those of Jimutavahana and Vijnaneshwara which have been accepted and acted upon by the different communities led by them. In re: *Collector of Madura v. Mathu Ramalinga Sathupathy* (x) their Lordship of the Privy Council unconsciously reiterated the above Mimansa principle in favour of the authority of current customs and of current legal treatises.

In the earliest stage of the Hindu society, prior to the digest writers, the idea of individual property was unknown; property was only conceived as a matter of corporate right, *i. e.*, as a matter of family or clan dominion, though it may be a bit difficult to say whether it was a corporate right or an individual right. The facts that existed in the primitive Hindu society do not clearly justify the formulation of individual or of corporate right of property. They indicate a vague idea of a trust, of which, however, there was no *cestu que trust* properly so called. It is clearly expressed in the *Smritis* that the possession of property by the family was not only for the interest of the living members, but also for those who had departed from this world and those who were yet to come. Property, in the modern sense of the term, could not be said to belong either to the father or to the other members of the family, jointly or severally, according to the state of things which then existed. One family could not interfere with the property of another family, and in this sense there was family property, partly fulfilling the modern idea of property. There was no definite rule as to the manner in which the right of the family as a unit was to be exercised. Questions of internecine claims, as among the members of the family, scarcely arose in those ancient days. In case of any such dispute the matter

(x) 20 W, R, 21 (P. C.).

was decided by local assemblies and not by judges. The Brahmin assessors who were judges both of law and facts took care to be guided by the peculiar circumstances of each case and decided the disputes accordingly. The undefined condition in which the rights of the members of a family were left by Manu, Gautama, Yajnavalkya, *etc.*, did not cause any inconvenience or disturbance in the administration of justice.

The system of Brahmin assessors ceased with the advent of Buddhism and the necessity of precise judicial principles as regards the law of property was felt: This need was supplied by Jaimini's Sūtras. The system of logic founded by Gautama, creating a spirit of analysis and generalisation which could not rest satisfied with the vague and defective texts of the Smritis, further helped in the development of the general principles of the law of property. With the influx of Buddhistic influence, the Mitakshara, and later on the Dayabhaga, came on the scene and supplied the details of the principles of the law of property.

These circumstances and successive stages show the extraordinary acumen and logical clearness exhibited by Vijnaneshwara and Jimutavahana in evolving general principles of law of property which bear an impress of faultless juridical analysis superior even to the juridical principles of the present times.

SECTION 2. EVOLUTION OF THE LAW OF PROPERTY

Development of the principles of succession and inheritance.

It appears from a study of the Smritis, that the idea of inheritance and succession had not at all developed by that time. The rules of partition were made to serve the purpose involved in the principles of succession and inheritance. Vijnaneshwara and Jimutavahana accepted this topic to settle and develop the general principles of the law of property including the rules of inheritance and succession. Those jurists treated partition incidentally, though they assigned to it an important place. In the treatment of the principles of succession and inheritance, they took different courses. Vijnaneshwara laid down that there was no succession and inheritance as regards a son and grandson with reference to the property left by the father or the grand-father. With respect to the grand-father's immovable property, the rights of the members of the family are practically analogous to those of the members of a corporation, the rights of membership of which accrue by birth. The right of inheritance and succession has been acknowledged subject to the above condition (by birth) which is

nothing but a compromise between the principle of corporate right and the principle of the right of individual succession and inheritance. On the other hand the other jurist, Jimutavahana has not accepted this compromise but has settled the matter differently.

In the sense of the Mimansa principle, as given in Adhikarana I, Ch. ii, Book VI, that every member of a family who joins in the family worship, has the full benefit of that worship, the principle as advanced by Vijñaneshwara finds a better support than that of Jimutavahana. "In other words, according to Jaimini, of the two, the father and the son, each gets the full benefit of the properties offered at sacrifices. By analogy from this, it might well be said that each member of a joint Hindu family consisting of a father and sons, was jointly with the rest, owner of the whole of the family property. Jaimini includes the wife also as a member of the family and as a participator in the benefit of worship. Vijñaneshwara, however, does not avail himself of this argument, and the reason is plain. He does not admit any connection between property and religious sacrifice; Vijñaneshwara discards the idea of property being an offshoot of religious ceremony. He gives, among others, this short reason that, the performance of religious sacrifices presupposes the idea of property with which to perform the sacrifice. He maintains that the conception of property consists mainly of a sense of worldly utility. Vijñaneshwara supports his position by appealing to the authority of Jaimini who has throughout differentiated worldly interest from the spiritual interest; although throughout he has held that the worldly utility is not incompatible with the spiritual mission of man. In fact, it appears that those conservative writers who hold property to be spiritual do more than regard the institution of property to be ultimately traceable to the supreme spiritual command enjoining the attainment of heavenly bliss." (x).

Jimutavahana did not recognise the juridical position of the family as a natural corporate body, the membership of which accrues by birth and in which the right of survivorship obtains. In preparation of his theory he first takes up the subject of transfer of property and maintains that a mere declaration of the transferor's intention to part with his property in favour of some one having sentiency is sufficient and acceptance is only an act of availing of the right, or that immediate acceptance is not necessary. This definition of transfer is based on gifts to gods in sacrificial acts; the priest utilising the effects of gifts, if practicable, benefits the donor. Jimutavahana, thus treating the right of succession and inheritance as similar to the right by gifts, connects the right of succession and inheritance with spiritual benefit to the

person whose property is to pass. He thus invents the principle of spiritual benefit in contrast with the principle of family corporation as advocated by Vijnaneshwara.

SECTION 3. JIMUTAVAHANA AND VIJNANESWARA

Gautama Sutra as interpreted by Jimutavahana and Vijnaneshwara.

The application of the Mimansa rules by the Digest writers would be better understood if it be considered as to how they themselves applied the Sutras to the Srutis. There is the Gautama Sutra "An owner is by inheritance, purchase, partition, seizure or finding." स्वामी रिक्त्यक्रयसंविभागपरिग्रहाधिगमेषु | Jimutavahana takes this text to mean that in case of each of the sources of ownership, *viz.*, by inheritance, purchase, partition, seizure or finding, there must be an ethical element to complete the valid acquisition of proprietary right. The ethical element is that in each case the act must be in fulfilment of *dharma* (duty) and not in violation of it. Inheritance *etc.* is, therefore, not a mere physical event according to the Dayabhaga, but involves a moral or religious element. The additional modes for the three castes are on the lines of their caste duties (*Barna dharma*) and the principle of proprietary right is to be sought in the teachings of duty. On the other hand another of the Mitakshara school takes the words inheritance, purchase, partition, seizure or finding as mere physical events that are invested with the sense of proprietary right by the consent of the people. According to this school the idea of proprietary right accrues by popular acceptance and by that alone. Whatever the difference may be between the two schools, both rely on the Mimansa principles.

Vijnaneshwara relies on Jaimini's Lipsa Sutras, as he calls the 3rd. Adhikarana of Chapter I Book IV. Jimutavahana bases his arguments on the principle of Pratipatti Karma with which Jaimini deals in the succeeding chapters of the same book.

Now let us examine Vijnaneshwara's interpretation of the Lipsa Sutras; he reads the third Sutra as follows: "The use of property in sacrifices is a matter of the man; if there could be nothing besides the effect of sacrificial precepts, then there would be no property, for sacrifices presuppose property; this being so, rules of gift, acceptance *etc.*, have been propounded as guides to men." [Jaimini IV. i. 3]

तदुत्सर्गे कर्मणि पुरुषार्थाय शास्त्रस्यानतिशङ्क्यत्वाच्च द्रव्यं चिकीर्ष्यते तेनार्थेनाभिसम्बन्धात् क्रियायां पुरुषभूतिः ।

He reads the fourth Sutra as follows: "These rules of gift, acceptance, *etc.* are not to be distinguished from the Sruti;

if they be violated, the sacrifices would be fruitless." [Jaimini IV. i. 4.]

अविशेषात्तु शास्त्रस्य यथा श्रुति फलानि स्युः ।

These two Sūtras are Purvapakṣa (statements of the objector). The decision which is in the fifth Sūtra reads as follows :

"Whether the property was acquired in the prescribed methods or not, as this question does not affect the purpose of a sacrifice, the use of the property (either way acquired) does not invalidate a sacrifice." [Jaimini IV. i. 5] **अवि वा कारणाग्रहणे तदर्थमर्थस्यानभिसम्बन्धात् ।**

The last Sūtra of the Adhikarana reads as follows :

"So it is by popular recognition." [IV. 6] **तथाच लोकभूतेषु ।**

Vijñaneshwara's comments on the Sūtras are found in his book. The translation by Colebrooke is, however, not very clear. Colebrooke is further mistaken in taking the word Guru which stands for Guru Prabhakara as meaning the venerable author (r).

Vijñaneshwara concludes, after considering the above Sūtras of Jaimini, that the conception of property is essentially a matter of popular recognition. Jimutavahana does not controvert the general proposition that a mere moral precept, as Puruṣa Dharma is, does not override the Vyavahara law settled more or less by popular recognition. What he denies is that the conception of property is void of ethical considerations and consists of physical acts alone. He holds that popular recognition is no doubt a factor of the conception of property, but it must be such as to be ultimately justifiable by the consciousness of Dharma as enjoined by the command '*Svargo Kamo Yajeta.*' The ethical factor is the chief ingredient in the conception of property. He supports this view by referring to the case in which the right of property accrues to the priest in the remnants of offerings, not because the priest accepts them, but because the votary offers them to the gods with pious devotion. He points out that here the worldly part of the thing is the appropriation by the priest, but that is not the cause of the proprietary right he acquires. This is merely a *Pratipatti Karma* (incidental action). The real cause of the transfer of the proprietary right is the pious mental action of the votary (y). As Jimutavahana believes in the ethical origin of proprietary right, he holds that an heir takes the property of his ancestor by virtue of spiritual benefit and the property descends to him as if by relinquishment by the ancestor, and it is not a case of acquisition by the heir.

On the other hand, Vijñaneshwara, relying on the theory of popular recognition holds that relationship by blood or otherwise which influences

(r) K. L. Sarkar's *Mīmāṃsā* p. 391-93.

(y) K. L. Sarkar p. 391; See Book I, p. 7 of this work.

men, is the basis of inheritance and succession. So he defines "heritage" (*dāya*) to be that wealth which becomes the property of another solely by reason of relation to the owner." It is on account of this difference between the two jurists that Jimutavahana has made the text of Manu as the basis of his principles, for Manu lays stress on the spiritual aspect of the thing. But Vijnaneshwara relies on the text of Yajñavalkya who prefers the matter-of-fact aspect of the subject. It is worth noticing that Vijnaneshwara uses the Mimamsa Adhikarana as construed by Guru Prabhakara who is reputed to be an heterodox propounder of the Mimamsa Sūtras. The strictly orthodox constructions of the Adhikarana by Savaraswami and Kumarila Bhatta do not support Vijnaneshwara's view. The jurists explain the Adhikarana as merely showing the difference between *Kratu Dharma* and *Manushya Dharma* without any reference to the idea of popular recognition.

In connection with the Lipsa Adhikarana, Vijnaneshwara says that a precept which belongs to the domain of ecclesiastical law has not, in the domain of Vyavahara, the same force as a positive and clear rule of the Vyavahara law itself has. In the same way Jimutavahana, dealing with the texts of Vyasa prohibiting one to alienate one's own share in joint property or one's own self-acquired property, says that this prohibition is a moral precept and cannot weigh against the man's right to exercise as much right of alienation as the positive civil law gives him. Jimutavahana takes it as an axiomatic principle of the Vyavahara law that a co-sharer can dispose of his share and that one can dispose of one's self-acquired property. If this is *factum valet* the doctrine is equally shared by both, as both hold that the breach of merely an admonitory precept, is a mere irregularity which does not invalidate the action.

The divergence of opinion between Vijnaneshwara and Jimutavahana as to the application of certain Mimamsa maxims in interpreting certain texts may now be considered. The text — a person shall not withhold any common property at the time of partition, and if he do so, it will be a fault, illustrates the matter in question. This text has been taken to be a Pratishedha (an absolute prohibition), and lays down that even when a co-sharer, who believing that he may use as his own what is common property, withholds it from partition, incurs the penalty of the text according to the peculiar rules of Pratishedha. On the other hand, Jimutavahana maintains that if the man be adjudged at all guilty, he would not be guilty of embezzlement and theft.

Vijnaneshwara says that the 'black kidney bean maxim' lays

down not only that what is prohibited cannot be used as a substitute for another thing, but also that if it be used indistinguishably mixed up with the allowed material, such a mixture too cannot be validly used. Therefore, he argues that when one withholds common property for his own use, he is not exonerated because what he withholds is a mixture of what is his and what is not his. The black-bean maxim is a *vider* of the Kalanja maxim which amounts to what may be roughly called a prohibition *in rem*. It lays down the principle that green kidney bean being allowed for use in a sacrifice and black kidney bean prohibited, if you make a powder by mixing up the ground particles of the two, that powder cannot be validly used. So Vijñaneshwara is too technical in this respect.

Jimutavahana does not hold such an appropriation to be theft. Referring to various authorities he shows that theft means taking by stealth or openly what a man knows not to be his own but to be the property of another. This does not apply to the case in question and, according to him, the application of the black bean maxim to this case is puerile; for, the definition of theft is not applicable to this case of embezzlement of common property. The learned jurist maintains that although the Pratishedha principle is of a sweeping character, yet as regards questions of guilt affecting property or the like, the provisions of the law constituting the crime should be strictly construed. As Kalanja maxim relates to those general, moral or religious matters called Purusha Dharma which are more or less of a general character so Jimutavahana has rightly taken cases of theft and the like out of the purview of that maxim. Kapijjala (partridge) maxim indicates that where a text involves the infliction of injury on another it should be narrowly construed.

The above is the divergence of opinion between the Mitakshara and the Dayabhaga schools. The same question arises under our present criminal law, *vis.*, whether a co-sharer appropriating joint property is guilty of theft. It has been held that he is not, and this is in consonance with the view of Jimutavahana.

The Dvayo Pranayanti maxim in connection with widow's right to succeed to her husband, who lived separately from his brothers, has been considered by Vijñaneshwara. The difficulty arises thus: Katayana says, "Heirless property goes to the king deducting, however, a subsistence for females." But then there are the texts regarding partition: "If he make the allotments equal, his wives must be rendered partakers of like portions." And again, "Of heirs dividing after the death of the father, let the mother also take the equal share,"

IV. Dvayo Pranayanti maxim.

Upon this Sreekara argues that the widow is to get a share where the property is small, but that she should get merely a subsistence allowance when the property is large. Vijnaneshwara holds that such a conclusion is open to the objection of *Vidhibheda* (attaching a double sense to the Vidhi), and thus it vitiates the maxim *Dvayo Pranayanti* which is the 9th Adhikarana, Ch. III. Book VII, Sntas 23-25.

Jimutavahana does not agree with Sreekara and refers to the following texts of Yajnavalkya, II, 139-40 :

“But of a re-united (co-heir), a re-united (co-heir) shall keep the share when he is deceased, or deliver it if he is born (in the shape of a son), but of a uterine brother, a uterine brother shall keep the share, or deliver it (to his son) if (he is) born (in the shape of a son): but a re-united half brother may take the property, not a half brother (not re-united); also a (brother) united (through uterine, i. e., a full brother) though not re-united may take, not the united, (i. e., re-united) half brother alone.”

संसृष्टिनस्तु संसृष्टि सोदरस्य तु सोदरः ।

दद्यादपहरेच्चांशं जातस्य च मृतस्य च ॥

अन्योदर्यस्तु संसृष्टी नान्योदर्यो धनं हरेत् ।

असंसृष्ट्यापि चादद्यात् संसृष्टो नान्यमातृजः ॥

With reference to the above texts, Sreekara holds that a re-united co-heir takes the wealth of a re-united co-heir, and the proposition that a uterine brother takes the wealth of a uterine brother does not warrant the conclusion that when there is a united half-brother and a separated whole brother, both of them inherit together.

Sreekara means to say : ‘If you want to make the separated uterine brother take together with the united half-brother, you have first to make out that a separated uterine brother has a right of inheritance as an uterine brother. To make out this you must read the text ‘a uterine brother takes of the united brother’ as an independent proposition without reference to the other text, *viz.*, ‘a united co-heir takes of the united co-heir? Again you have to establish that a separated uterine brother takes jointly with a united half-brother. In order to establish this you must read the above two texts together, the one as being subject to the other. This, he says, is double reading, and as such sins against the *Dvayo Pranayanti* maxim.

Jimutavahana puts Sreekara’s contention, which is contained in Colebrooke’s translation of *Dayabhaga* Ch. XI, Sec. 5, para 16, very fairly and the relevant passage runs thus :

“Thus to make two Vidhis both irrespective of each other and at

the same time to make them dependent on each other is not proper, this being the fault of what is called *Vidhi Varshamya* (inconsistency in a Vidhi). Such inconsistency is condemned by Dvayo Pranayanti Adhikarana." Jimutavahana continues as follows:

"In the next place, he (Sreekara) goes on to show that, in the instance in question, the case of the existence of a united half-brother and the case of a separated whole-brother cannot be freed from the absurdity of the double application as shown by him at the very outset. And that therefore one must give up the hope of establishing that both of them succeed together. Consequently, according to him, the question becomes whether the one or the other should succeed. And to this question he answers that the whole uterine separated brother should succeed, because the rule regarding the half brother is only a general *prima facie* rule, which is controlled by the special rule regarding the succession of the whole brother."

न चैकस्य सापेक्षं निरपेक्षञ्च विधायकत्वमुचितं विधिवैषम्यं प्रसङ्गात् यथा दर्शितं द्वयोः प्रणयन्तीत्यधिकरणे तथाचात्र यत्रैव निरपेक्षविधायकत्वं तत्रैव संसृष्टिनस्तु संसृष्टीत्यस्य सोदरस्य तु सोदर इत्यस्य च प्रवृत्तिः स्यात् । तत्रासोदरे संसृष्टिनि सोदरे चासंसृष्टिनि सत्युभयोरप्रवृत्तेस्तद्धनं न कश्चिदपि गृह्णीयादित्यापद्यते तस्मात् संसृष्टिनस्तु संसृष्टीति संसृष्टधने संसृष्टिनः सामान्यतो भागप्राप्तौ तदपवादार्थं सोदरस्य तु सोदर इति वचनं एवञ्च संसृष्टिनोप्यसोदरस्य सोदरे सति न प्राप्तिः किन्तुहि विभागसंसृष्टस्य असंसृष्टस्य च सोदरस्यैवेत्यन्तं । तदसङ्गतं नहि द्वयोरुभयत्रैकैकशः प्रवृत्तयो युगपदेकत्र प्रवृत्तिमात्रेण विधिवैरूप्यं ॥

Jimutavahana says that the reading of the two texts, each of them independently and again both of them together, is not in violation of the principle laid down in the Dvayo Pranayanti maxim as it forbids two readings of texts which are inconsistent or contradictory. It does not prohibit the reading of two texts independently and again reading them together so as to apply them to a new case. Jimutavahana begins his arguments thus :

"That is not congruent : for it is not true, that there is variability in a precept, merely because two (rules) which are severally applicable to two (cases) become applicable in a single instance at the same time."

तदसङ्गतं नहि द्वयोरुभयत्रैकैकशः प्रवृत्तयो युगपदेकत्र प्रवृत्तिमात्रेण विधिवैरूप्यं ।

These arguments are contained in paras 17-31 of section 5, Ch. XI of Colebrooke's translation of the Dayabhaga. He begins by giving

examples of what inconsistency (*Vidhi Vaishamya*) is, and what it is not. He refers to the *Sanyoga Prithaka* and other such maxims as showing cases of double reading without inconsistency, and explains the *Apachheda* and other maxims as cases of inconsistency of texts. Jimutavahana's explanation of the *Apachheda* maxim may be quoted here :

"Thus, in respect of the precepts enjoining the votary to bestow his wealth as a gratuity in one instance and no gratuity in the other, which are respectively applicable independently of each other, if either the priest doing the functions of *Udgatri* or the one performing the office of *Pratistotri*, singly stumble (in passing from the one apartment to the other, at the celebration of the sacrifice called *Jyotishoma*); but if both these priests stumble at the same time, neither injunction would be a variableness in the precept." (Colebrooke).

**केवलोद्गातृ प्रतिस्तोत्रपच्छेदेन निरपेक्षप्रवृत्तयोः सर्वस्व दाक्षिण्यादाक्षिण्य
शास्त्रयोर्युगपदुभयापच्छेदे सति नैकमपि शास्त्रं प्रवर्तेत विधिवैक्यात् ।**

In this connection Jimutavahana has explained the general principles of the law of prohibition and exception (as given at p. 35) and has also discussed the classification of positive *Vidhis* either to be *Nitya* or *Naimittika* or *Kamya*. He holds this case to be of *Kamya Vidhi* and puts it thus to Sreekara :

"You really treat the second part of *Vajnavalkya's* text as a *Nitya Vidhi*. But if it were so, the whole text providing about optional and voluntary acts, such as separating and non-separating, becomes absolutely useless and irrelevant." So Jimutavahana concludes that effect should be given to both parts of the text by holding that, where there is an associated half-brother and an un-associated full-brother, they should divide the property equally. He settles the whole controversy by showing that the word 'alone' should be understood to qualify the words towards the end of the passage. And Colebrooke has accordingly inserted this word.

K. L. Sarkar (p. 404) sums up the discussion thus : "The bearing of the *Dvayo Pranayanti* maxim on the general arrangement of the *Mimansa* system is this : The axiom of a word once uttered not to be taken in two senses, prevents the misapplication of the *Linga* principle. The *Dvayo Pranayanti* maxim prevents the misapplication of the *Vakya* principle by preventing such reading of two clauses with each other as lead to inconsistency. There is also a rule to prevent the misapplication of the *Prakarana* principle. This rule is known as the rule disallowing *Aniprasanga*, *Atiprasanga* meaning the far-fetched inclusion of one idea up to another. Jimutavahana by his nice dissertation, emphasised the *Dvayo Pranayanti* maxim."

It would be interesting to note how far the Dvayo Pranayanti maxim has been trodden upon by the Judges :
Jimutavahana's view as to father's power over ancestral and self-acquired property: Jimutavahana has laid down that the father of a family has absolute proprietary right to his self-acquired property; but his proprietary right to ancestral property is so limited as to entitle him to a double share only at the time of partition, and to leave him no right to make any arbitrary distribution among his sons. Thus the father's right over ancestral property is restricted and he is bound to make either the shares of the sons equal, or to give to the eldest and the middle ones the excess prescribed by Manu. He can, of course, retain for himself a share double that of a son, and can also sell a part of the property for the maintenance of the family.

It is thus evident that the father is a co-parcener of the ancestral property to the extent of a double share, then the *factum valet* doctrine may be applied to alienations made by the father, of his share only. How can this doctrine therefore be applied to one's own exclusive property and again to what is not exclusive property? It would be a case of Vidhi Vaishamya as explained by Jimutavahana. The English Judges committed a mistake by applying the doctrine to both cases, inconsistent with each other, and violated the principle of Vidhi Vaishamya or the Dvayo Pranayanti maxim.

Jimutavahana has clearly restricted the father from selling or otherwise disposing of ancestral property, because of the sons having a legal right of maintenance by the express text of Manu and also because of the reason that a father cannot partition the ancestral property before the mother is past childbearing age. Thus the father held the ancestral property subject to the legal charge of maintenance in favour of the sons. This charge has never been taken as a matter of moral precept like that of the precepts regarding maintenance out of the self-acquired property of the father or out of the property of co-parceners.

These texts which he takes as moral precepts, and the breach of which he takes as cured by the *factum valet* principle are as follows :
 " Though immovables or bipeds have been acquired by a man himself, a gift or sale of them (should not be made) by him, unless convening all the sons."

" A single parcener may not, without the consent of the rest, make a sale or gift of the whole estate, nor of what is common to the family." (Vyasa).

स्थावरस्य समस्तस्य गोत्रसाधारणस्य च ।
 नैकः कुर्यात् क्रयं दानं परस्परमतं विना ॥

“Separated kinsmen, as those who are unseparated, are equal in respect of immovables; for one has not power over the whole, to give, mortgage, or sell it.”

विभक्ता अविभक्ता वा संपिण्डाः स्थावरे समाः ।

एको ह्यनौशः सर्वत्र दानधनविक्रये ॥

[Vyasa]

The reason of applying the *factum valet* principles to these texts is obvious. They must be mere moral precepts, as being inconsistent with the following text declaring individual right of property :

“When there are many persons sprung from one man, who have duties apart, and transactions apart, and are separate in business and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth.” (Narada XIII, 42, 43)

यद्येकजाता बहवः पृथग्धर्माः पृथक्क्रियाः ।

पृथक्कर्म गुणोपेता न चेत् कार्येषु सम्मताः ॥

स्वभागान् यदि दद्यस्ते विक्रीणीयुरथापि वा ।

कुर्युर्यथेष्टं तत् सर्वमीशास्ते स्वधनस्य वै ॥

But how can this doctrine be applied to the following texts of Yajnavalkya and Manu which are not inconsistent with any other positive rules and which Jimutavahana throughout treats as binding :—

“The father is master of the gems, pearls and corals and of all (other movable property); but neither the father, nor the grandfather, is so of the whole immovable estate.” [Yajnavalkya]

मणिमुक्ताप्रवालानां सर्वस्यैव पिता प्रभुः ।

स्थावरस्य तु सर्वस्य न पिता न पितामहः ॥

“The support of persons who should be maintained is the approved means of attaining heaven. But hell is the man’s portion if they suffer. Therefore (let a master of a family) carefully maintain them.” (Manu)

Thus Jimutavahana clearly admits that the restriction imposed by the texts of Yajnavalkya and Manu on the power of the father’s ownership over ancestral property is legal to the extent of the charge which the sons have over it for maintenance and that the restrictions imposed by the text of Vyasa and others regarding the self-acquired property, are merely moral precepts having no legal force. This distinction has been constantly maintained. If the Mimansa rules of interpretation would have been properly applied no such mistake, viz., that of removal of the above distinction, would have occurred. The

construction of the so-called *factum valet* text to the effect that Jimutavahana makes no distinction between ancestral and self-acquired property violates all the general principles laid down by Jaimini, such as, Linga, Vakya and Prakarana

It is, therefore, evident that the Mimansa rules of interpretation are applicable and can be usefully applied to the construction of the works of Digest writers, who have codified the Smritis and who are to be looked upon as our latest lawgivers. But the pronouncements made by the British Indian courts, whether right or wrong, are to be accepted as the law. Owing to the ignorance of the application of the Mimansa principles the question that the father's devise of ancestral property is subject to the charge of maintenance of sons has not been pressed and the decisions are conclusive as regards the Bengal school of Hindu Law that the father has absolute right of disposal in respect of the ancestral property as well.

Another instance of the wrong construction of Jimutavahana's text in connection with the power of disposal of immovable property by the father is this :
Law of wills and gifts.

The law of wills is engrafted on to the law of gifts in the Bengal school. According to the Mimansa principles the law of gifts has been made applicable to that of wills by way of Atidesha. It has been explained that in this respect one has to see that an old rule is not made applicable wholesale to a new case if parts of the former do not fit in with the latter and such parts should be treated as Badha. Briefly, the Mimansakas hold that in applying our old rule to a new case the general rule may be subjected to exceptions.

The general principle as to gifts has been laid down by Jimutavahana thus :

"The donee's right to the things arises from the act of the giver ; namely, from his relinquishment in favour of the donee who is a sentient person." [Dayabhaga, Ch. 1, para 21]

दाने हि चेतनोद्देशविशिष्ट त्यागादेव दातृव्यापारात् सम्प्रदानस्य ग्रह्ये स्वामित्वम् ।

On the basis of this text their Lordships of the Privy Council held that under the Bengal school a testator cannot make a valid bequest in favour of a person who is not in existence at the time of his death. This principle as to the invalidity of gifts

Principle of invalidity of gifts in favour of non-existent too general.

in favour of non-existent persons is too general. According to the Hindu Law and Jimutavahana's own text, this general proposition should be subjected to an important exception as regards testamentary settlements in favour of lineal descendants up to the

great-grandson though not in existence, as the accepted principle of the Hindu Law is that a man should not only provide for the maintenance of the existing members of his family, but also for those who are yet to be born. There is a text of Vyasa also to this effect :

"Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, and they who are yet un-begotten, and they who are still in the womb, require the means of support ; no gift or sale should therefore be made."

स्थावरं द्विपदञ्चैव यद्यपि स्वयमर्जितं ।

असम्भूय सुतान् सर्वान् न दानं न च विक्रयः ॥

ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिताः ।

वृत्तिं च तेऽभिकाङ्क्षन्ति न दानं न च विक्रयः ॥

This text has been quoted in the Mitakshara, though partially by Jimutavahana, in connection with the widely known saying that a fact cannot be altered by a hundred texts. It is true that the text has been treated by Jimutavahana as a moral precept. But if it is the duty of a man to provide maintenance and support for those members who are born and those who are yet un-begotten, it is absurd to suggest that it is illegal to provide by will for grandsons, great-grandsons and the like who may not be in existence at the time of the testator's death. Jimutavahana himself acknowledges that one who violates the precept incurs a sin, and he emphasises the duty of maintaining the family by quoting the text of Manu :

"For, the maintenance of the family is an indispensable obligation, as Manu positively declares, 'The support of persons who should be maintained is the approved means of attaining heaven. But hell is the man's portion if they suffer. Therefore, (let a master of a family) carefully maintain them.'"

कुटुम्बस्यावश्यं भरणायत्वात् यथा मनुः ।

भरणं पोष्यवर्गस्य प्रशस्तं स्वर्गसाधनं ।

नरकं पीडने चास्य तस्माद्यत्नेन तं भरेत् ।

Of course there must be some limits as regards the members not yet born and it is clearly indicated by the text of Manu so often quoted by Jimutavahana :—

"To three must libations of water be made ; to three must libations of food be offered."

The underlying idea of the Hindu philosophy of life is that there is the continuity of the same person. Therefore, in applying the

principle to the law of gifts which requires that the donee should be a sentient person, in the case of a will an exception must be made as regards devises in favour of descendants up to the great-grandson. The Badha principle requires such an exception to be made, but unfortunately this exception was not accepted by their Lordships of the Privy Council in *Tagore v. Tagore* (2). The only exception to the rule against perpetuity with respect to religious and charitable trusts has been admitted.

K L. Sarkar, the learned Tagore Law Professor, has summed up these misinterpretations thus: "Vijnaneshwara's work has no less suffered at the hands of English Judges in the way of wrong interpretation than Jimutvahana's work. The basical principle of his work restricting the disposing power of the father with respect to ancestral property has been virtually done away with, and that by violating the Dvayo Pranayanti maxim which he, in common with Jimutavahana, revered. By the two clauses translated by Colebrooke in paras 28 and 29, Section 1, Chapter I, Vijnaneshwara limits the power of the father to the right to alienate properties, either in case of minority of his children or for family necessity or for pious duty. This is very short of the large power which has now been adjudged to him, *viz.*, to alienate for any cause provided it is not for immoral purposes. This large power is given by relying on the clauses 50 and 51 of Yajnavalkya regarding the duty of sons to pay their father's debts. But these clauses relate to the payment of debts of a father who is really or practically dead. These clauses have nothing to do with debts contracted by a father while he is living. To read these debt clauses once as only relating to the liability of heirs and again as affecting the liability of co-parceners is, simply a violation of the Dvayo Pranayanti maxim as explained by Vijnaneshwara." (p).

SECTION 4. NILAKANTHA, MEDHATITHI AND RAGHUNANDANA

Nilakautha's work, the Vyavahara Mayukha, is a general digest, prevalent in the Bombay presidency. Nanda Pandit has given a special treatise on adoption, *viz.*, the Dattaka Mimamsa whose view has been followed by the Dattaka Chandika. These authors differ in relying on the Mimamsa principles in enunciating the law of adoption. So their discussions on the particular subject of adoption illustrate and explain those Mimamsa principles. Nilakantha's scholarship in the Mimamsa Shastra is as great as that of his venerable father, Sankara Bhatta, the author of Mimamsa bala-pikash.

He was a lawyer of liberal views who never betrayed a spirit of exclusiveness. According to him, the Sudras are subject to

the three debts equally with the three twice-born castes, a position not conceded to them by the other jurists. His liberal tendency is evident from his recognising the power of the widow to adopt a son, while according to Nanda Pandit she cannot adopt even with the assent of her kinsmen. Nilakantha favours the adoption of sister's son and the like, contrary to the view of Nanda Pandit. The Privy Council in one important question, *viz.*, the non-eligibility of the son of the sister and the like, have given effect to the views of Nanda Pandit. They have done so on the ground that those views have been acted on for a long time. Before taking up in detail the differences of opinion among them regarding adoption, it will be profitable to consider other subjects.

Let us examine how far a sovereign has a proprietary right to the soil included in his dominion. It is Sarvadakshina maxim regarding which Nilakantha says:—

"In conquest also, where there is ownership of the conquered in houses, lands, money, or the like, therein only arises the ownership even of the conqueror: but where the conquered has a right to taking taxes (only), the conqueror has even the same, and no ownership. Therefore, it is stated in the sixth book of the Purva Mimansa, 'the whole earth cannot be given away by the king of the world; neither the (whole) Mandala (dependency) by the ruler of that dependency.' The ownership in each village, field, and the like of the whole earth or the dependency belongs solely to the respective *Bhaumikas* or landlords. The ruler has only to take the taxes. Hence in what is now technically called a gift of land, *etc.*, a gift of the soil is not accomplished, but only a grant of due allowance (as provided). But in purchases made from the *Bhaumikas* or owners of the soil, even ownership in houses and soil accrues. Therefore (to the giver of such land) there is also the fruit of the gift of the soil." [Mandlik's Ed. pp. 34-35]

Nishada Sthapati maxim shows that a Nishada can be a Sthapati—

II. Nishada a sacerdotal functionary—as referred to by **Sthapati maxim.** Nilakantha in the following passage:

"Thus the right of a Sudra to adopt, being established like the established right of the carpenter—Nishada (to perform a sacrifice), the assertion in the Shuddhi Viveka that a Sudra is not entitled to make the acceptance of a son, which has to be accomplished through Vedic Mantras (sacred texts), and by a Homa (sacrifice to the fire) is also rejected." [Ibid pp. 55-58]

The two texts of the Maitra-Varuna maxim:

"He hands over the staff to the Maitra-Varuni priest." and "He initiates by means of the staff."

mean that the initiation must take place by a staff which has been handed over by the priest or, alternatively, that a staff must be handed over to the priest in order that he may effect the initiation by it. The question is which of the two sentences is imperative and which is a mere recital.

Jaimini holds the latter construction to be more proper and the Adhikarana means that the words 'hand over the staff' are not merely the recital of an act done but constitute an injunction.

Utility of the maxim.

Nilakantha has made use of this maxim in construing Saunaka's text :

"The daughter's and the sister's sons are indeed adopted as sons by Sudras."

दौहित्रो भागिनेयश्च शूद्रैस्तु क्रियते सुतः ।

Nilkantha takes the above text as divisible into two parts : (1) The daughter's and sister's sons are adopted. (2) They are adopted indeed by the Sudras. By applying the Maitra Varuna text he holds that the first sentence indicates as to what should be done, and the latter sentence is a subsidiary recital. Therefore, the text does not lay down that the adoption of a daughter's and sister's son is limited to the Sudras. For if it be so limited the rule of Parisankhya appears applicable which means that what is expressly mentioned excludes what is not mentioned. This rule is not legitimate according to the Mimansakas.

Sankara Bhatta's application of the maxim of the Three Debts :

IV. Maxim of Three Debts.

"[If it be asked] how the son is of future use, the answer is :—In the Vedic text 'There is no [translation] to the higher world [after death] in the case of a sonless man : [for] by his birth a Brahmana becomes a debtor in three [ways, viz.], to the gods in sacrifices, to the manes in issue, [and] to the Rishis in learning'; the term Brahmana is used as illustrative [of all the classes], as has been stated in the Adhikarana (aphorism)—*Brahmanasya Somavidyā prajāsrinavakyenā Samyogat*, [Jaimini VI. ii. 31] ब्राह्मणस्य तु सोमविद्या प्रजासृणवाक्येन सयोगात्, which means 'To the Brahmana *soma* (or sacrifice), *Vidyā* (knowledge of the Vedas) and *Praja* issue [in the shape of sons] are [necessary], because of the applicability to him of the text of [the three debts]. Thus a Sudra [too] has to discharge his debt to the manes.' (Mandlik's Ed. pp. 54-55).

The authors of Dattaka Mimansa and of the Dattaka Chandrika rely equally on Mimansa principles in dealing with the law of adoption. For instance, among others

V. Adoption.

the Dattaka Mimansa refers to (1) Pranbhrit Maxim(a), (2) Vaiswadeva Maxim (b), (3) Jateshti Maxim (c), (4) Ishti Somaya (d) and some other Maxims regarding the order in which acts should be performed. The Dattaka Chandrika refers to the Ambiksha Maxim (which is referred to by Nanda Pandit as well) and the Kapijjala Maxim among others.

• This maxim means that what originally had a limited signification,

Pranbhrit maxim.

may have acquired an extended one. Nanda Pandit has laid down that the word substitute though at first applied to only five descriptions of sons, is, by general use, now applied to all the twelve descriptions of sons (D. M. Sec. 1, para 35):

यथा क्षेत्रजपोत्रिकेयपुत्रिकाकानीनौनर्भवसहोदजगृहजनानां कचित् मातृमात्र
सम्बन्धात् कचिच्चाविकलोभय सम्बन्धादविकलावयवत्वेन मुख्यप्रतिनिधित्वं
दत्तकक्रीतकृत्रिमदत्तात्मापण्डितानां वाचनिकं प्रतिनिधित्वमिति प्रतिनिधिशब्दश्चो-
भयत्रापि भूम्ना सृष्टोरुपदधातीतिवत् ।

This maxim lays down the principle that in the case of a compound word like Vaiswadeva the meaning of the component parts being ignored, the conventional sense of the whole is to be adopted. The term Vaiswadeva is the proper name of a particular Yajna but not of the god of the universe. This principle has been utilised by Nanda Pandit to show that although the word *Sapinda* has an etymological sense consisting of the meaning of *Sa* and *Pinda*, the conventional meaning of the compound word, as indicated by a certain text of Manu, should be accepted (D. M. Sec. VI. para 27).

The Jateshti Maxim or the maxim for the substitution of the Putika plant for the Soma plant पृतिकस्य सोमप्रतिनिधित्वाधिकारणम् । (Jaimini VI. iii. 13).

It holds that a thing is enjoined for a certain purpose but in its absence another thing which serves that purpose may be substituted. In the case of the adopted son Medhatithi raises the question that he cannot be the substitute of a begotten son, because the paternal debt is satisfied by begetting a son, and begetting is wanting in the case of adoption. By the aid of this maxim Nanda Pandit refutes Medhatithi's objection and explains that the case of the thing for which a substitute is to be made is not to be looked at from the standard of the thing substituted but from the view point of the purpose which the substitute serves. He further supports his view by arguing that a son

(a) Jaimini I. ii. 10. See p. 100 of this work.

(b) Ibid. I. iv. 18. See p. 100 of this work.

(c) Ibid. I. iv. 18.

(d) Ibid. V. iv. 3.

secures salvation by offering Pindas, and an adopted son would serve the same purpose and that the act of begetting is incidental in the way of securing the instrument for the purpose of salvation [D. M. Sec. 1. para 41.]

तस्मादानुस्यभाड्यकायां भावनायां पुत्रस्य कर्णतया तदपचारे दत्तका
दीनां प्रतिनिधित्वमविरुद्धं सोमापचारेपूतिकानामपि ।

Nanda Pandit invokes the Ishti Somaya maxim to clear the difficulties arising from texts as to the necessity of performing the Jateshti ceremony (the sacrifice for the well-being of the born) on the part of an adoptive father, the sacrifice for the male issue and the burnt sacrifice in case of the adoption of a previously betrothed woman. These ceremonies have been prescribed to be performed by the natural father shortly after birth. In view of these difficulties Nanda Pandit held that an adoption up to the fifth year is valid and it is also valid if the *tonsure* ceremony has not taken place. The adoptive father is also required to perform these ceremonies. He gets over these difficulties by making use of the Ishti Somaya maxim which in effect lays down that when a difficulty arises with reference to the order in which an action is to be performed, reason and necessity must be taken into consideration. In the same way Nanda Pandit also makes use of the 17th and 18th Adhikaranas which allow the shifting of time in emphatic terms by pointing out that because the birth ceremony is to be performed, just on birth, the literal meaning cannot be carried out, for the child must have time to breathe and suck his mother's breast otherwise the consequence may be fatal.

Nanda Pandit refers to the second Adhikarana of Book X. Chapter 8 lays down that in the Pashu Yajna the prohibition of the two offerings of ghee called Ajyabhaga is merely an Arthavada. This maxim has been referred to by him in laying down the proposition that the marriage of a person with a Sapinda girl, has no application to the case of the marriage of the adopted son with a girl who is a Sapinda of his adoptive father, as he says that the prohibitory rule is merely a recital of the prohibition of conjugal connection between persons related both by birth as well as by the practice of the offering of oblations. This rule cannot be applied in the case of an adopted son [D. M. Sec. VI. para 31]

The object of this maxim is to separate the principal effect from the incidental. This maxim has been made use of by Dattaka Chandrika in removing the objection of those who do not accept two co-widows as the adoptive mothers of the child if one of them did not join in the act of

**Amiksha
maxim.**

adoption. The author argues that the adoption is really to the husband and that the relationship of the son with the wife of the adopter is merely incidental. So it is quite immaterial which of the two widows adopts, the adopted son bears the same relation to both the widows.

This maxim has been referred to by Dattaka Chandrika in connection with the word *Brahmanas* in the plural number, which occurs in a portion of Saunaka's quoted text.

Kapijjala maxim.

Texts of Saunaka and Sakala as to adoptibility of certain sons.

The authors of Dattaka Mimansa and Dattaka Chandrika take the text of Sakala to be clear and conclusive as to the adoptibility of daughter's or sister's or maternal aunt's son. But Nilakantha's treatment of Saunaka's text shows the doubtful nature of that text. Sakala's text also, which is in contravention to the text of Manu, laying down that the daughter's son may be accepted in some cases as a son, is extremely doubtful. As regards the adoption of a boy who is the only son of his parents, both commentators entertain no doubt as to the binding character of the texts of Saunaka and Vasistha on the point, although their Lordships of the Privy Council have held the texts to be merely directory.

Medhatithi shows that in the passage *Varhi Deva-sadanam dami—* an affirmative sentence is treated as mandatory by the principle of *Linga* (the suggestive power of words).

(1) Application of Linga principle.

वर्हिदेवसदनं दामीति लिङ्गादनेनवर्हिनुनातीति ध्रुतेरनुमानम् ।

He also emphasises the principle that where a clause clearly shows an express command, the principle of *Linga* is not to be resorted to.

विषयर्थता चावगम्यमाना लिङ्गादीनां त्यक्तास्यात् ।

He further holds that where acts are enjoined without the mention of any beneficial result, the acquisition of heavenly bliss is to be presumed as the intended result of the *Viswajit Nyaya* सौख्यादिषु इत्यादि ।

(2) Kamya and Nitya Vidhi.

He has even explained that where the attainment of a benefit is the object of a prescribed act, if a man does not perform the act, he loses the benefit, as in the case of a *Kamya Vidhi*. But in case of a *Vidhi* being absolute (*Nitya*), the question of benefit does not arise; in the case of failure the person suffers the evil consequences of disobeying it, and that he is to do the act to prevent those evil consequences. *Apurva* sanction has also been clearly explained by him (by comments on Sloka 7, Ch. I).

Medhatithi applies *Grahaikatva* maxim to the passage "A Brahmana

(3) Grahaikatwa maxim.

should not drink spirituous liquor" and interprets it to include the whole class of Brahmanas, male and female. In this connection he also discusses why the passage 'sacrifice animal in a Yaga' should not be so construed as to justify the sacrifice of many animals but should be interpreted literally to mean the sacrifice of a single animal. It relates to another maxim [Sloka 90, Ch V] Many such instances can be found in his commentary.

Raghunandana in connection with Manu's text: अवगूर्यचरेत् कृच्छ्रमतिकृच्छ्रं निपातने "one who assaults a Brahmana must perform the *kricchra* penance," explains that it should not be taken as a *Prakarana* of the *Darsa Purnamasī Yagya* in relation to which it occurs, but as a general *Vidhi*. Another question arises as regards this passage whether when a man assaults five Brahmanas, he is to perform the *Kricchra* penance five times. Raghunandana holds that by the principle of *Tantrata* one performance of the penance is sufficient. One more question arises as to what would be the punishment in case of its defiance. Raghunandana says that punishment is mentioned in the next sentence which is an *Arthavada* supplying the defect of the *Vidhi* text.

Application of Vaky principle by Raghunandana. *Apurva* sanction has been illustrated by Raghunandana with regard to the *Janmastami* ceremony where a reward has been mentioned for the fasting but none has been expressly mentioned for the act of worship itself to be performed on the occasion.

Illustration of Apurva sanction.

With reference to the *Smṛiti* text requiring animal sacrifices at the *Durga Puja*, owing to the Vedic *Vidhi* prohibiting the causing of injury to living beings, the *Smṛiti* text requiring the sacrifices of animals cannot hold good. Raghunandana meets this objection thus: a *Pratishedha* (negative *Vidhi* proper) has for its object the prevention of that which a man would do by his own inclination or passion and, as such, it cannot include the prevention of what a man is to do as a duty. So there is no conflict [*Tithitattwa* in *Ashtabinsatitattwa* p. 40, B. M. Dey's Edition]. Raghunandana has also treated the subject of *Badha* and *Atidesha* at length in his *Tithitattwa*.

Animal sacrifice in Durga Puja vindicated.

"Raghunandana illustrates the difference between a *Pratishedha* and a *Paryudasa* by the prohibition that one should not take food on the *day* of the eleventh day of the moon. He holds that in the event of the *Ekadasi* expiring in course of the day, the above mentioned *Vidhi* requiring fasting for the whole day, would override the injunction that one should perform the *Vishnu Puja* after the expiry of *Ekadasi* and should eat the relics of the offering."

With reference to the following text Raghunandana discusses at length the nature of Paryudasa in Malamasatattwa, section 12 :

“Sraddha is not to be performed in the night, etc.”

रात्रौ श्राद्धं न कुर्वीत राक्षसी कीर्तिता हि सा ।

सम्योरुभयोश्चैव सूर्ये चैवाचिरोदिते ॥

This is to be read with the text laying down that the Parvana Sraddha is to be performed during the new moon (which may extend into the night). He sums up the discussion by the observation :

“Paryudasa occurs where there is an ascendancy of the positive clause and there is an inferiority of the negative clause, and where the negative clause comes after. On the other hand, where the inferiority is in the positive clause and the superiority in the negative clause, and where the negative particle refers to the essence (predicate) of the positive clause, there the negative clause is a *Prasahya Pratishedha*.” [Malamasatattwa p. 80]

प्राधान्यन्तु विधेयत्र प्रतिषेधेऽप्रधानता ।

पर्युदासः स विधेयो, यत्रोत्तरपदेन नञ् ॥

अप्राधान्यं विधेयत्र प्रतिषेधे प्रधानता ।

प्रसज्यप्रतिषेधोऽसौ क्रियया सह यत्र नञ् ॥

He further explains that generally the non-compliance with the exception does not subject one to any punishment, such non-compliance only rendering the act ineffectual, but in some exceptional cases, the non-compliance may be visited with penance (punishment). According to Jaimini the prohibition in such a case is called an *Anarambha Pratishedha*. But Raghunandan holds that the prohibition in such cases should be taken in the double sense of a *Pratishedha* and a *Prayudasa*. This view is contrary to the principle laid down in Dvayo Pranayanti maxim.

With reference to the performance of Sraddha, Raghunandana illustrates the Laghava axiom, *i.e.*, the axiom requiring simplicity. He also discusses the Atidesha principle with reference to a text laying down that the eldest son is not to offer the *Pinda* on a certain day of the moon (x).

Laghava axiom.

Atidesha principle

Atidesha principle.

SECTION 5. UTILITY OF THE PRESUMPTIONS OF SUBSTANTIVE LAW IN MATTERS OF INTERPRETATION

For the interpretation of Hindu Law a knowledge of the principles which underlie the whole of the Smriti law is very essential. When the language of a text is not clear, the established presumptions of the

Principles underlying Smriti law.

substantive law alone can help an interpreter. Therefore, it is but essential that one should know the presumptions of the substantive law of the Hindus. Though Jaimini has largely dealt with the principles of the laws of sacrificial acts and his treatise abounds in the examples of interpretation with reference to the presumptions arising from the sacrificial laws, *e. g.*, Darsa Purnamasi, the Agnihotra and the like, he is not silent on the principles of civil law as well.

Jaimini has dealt with the fundamental principles of substantive Smṛiti law. The three great leading presumptions which serve as beacon lights to interpretation are given below :

Three great presumptions :

- I. Every Aryan is to make religious sacrifices.
- II. Every Aryan is to seek knowledge.
- III. Every Aryan is to have a family.

These are termed as the *three debts* of an Aryan. Jaimini names these three propositions as the maxim of the three debts. The Sutra on the subject runs thus :—

“Of the Brahmin sacrifice, learning and family life (are absolute duties) being joined with the word debt.” (Jaimini VI. ii. 31).

ब्राह्मणस्य तु सोमविद्याप्रजासृणवाक्येन संयोगात् ।

Savara Swami explaining this maxim in detail, points out that these are the Vedic texts :

“One must pray and sacrifice by sacrificial acts.” **सोमेन यजेत ।**
[Taittiriya Samhita 2, 5, 6, 1]

“The Brahmana must assume the sacred thread in the eighth year.” [Ibid]

“One must beget children.” [Ibid] **प्रजामुत्पादयेत् ।**

The author says that they are absolute because these three classes of duties are mentioned as debts in the following Vedic text :

“A Brahmana becomes free of his debt to the gods by sacrifice, that due to the Rishis by austere learning of the Vedas, that due to the forefathers by begetting son.” [Taittiriya Samhita 6, 3, 10, 5].

जायमानो हि वै ब्राह्मणस्त्रिभिः ऋणैः ऋणवान् जायते यज्ञेन देवेभ्यो ब्रह्मचर्येण ऋषिभ्यः प्रजया पितृभ्यः एष वा अनृणो ।

It is argued that although only the word Brahmana is used, the rule applies to all Aryans. Savara Swami further refers to the following passage of the Vedas as illustrating the maxim.

“In every spring season sacrifice and pray by the brilliant light, during the whole life practise invocation by fire, as also pray and sacrifice by the new and full moon celebration. Similarly acquire learning, similarly be father of sons.”

वसन्ते वसन्ते ज्योतिषा यजेत, यावज्जीवम् अग्निहोत्रं जुहोति, यावज्जीवम्
दर्शपूर्णमासाभ्यां यजेत तथा विद्यामधीयीत । तथा प्रजा उत्पादयितव्या इति ।

Therefore, it is but essential that in construing the texts relating to the duties and rights of the Hindus, it should be presumed that all texts more or less intend to promote these three classes of duties, *vis.*, the presumptions arising in favour (1) of securing spiritual welfare, (2) of encouraging learning and skill and (3) of the family institution.

These three presumptions have been relied upon by digest writers. Jñātavahana, discussing the principles of succession, distinguishes between the Śruti texts many of which are at variance with one another, and relies mainly on the presumption in favour of spiritual welfare. This theory of spiritual benefit is similar to the principle of *Swargo Kamo Yajeta*. He clearly favours and encourages *Vidya* (learning) with reference to the texts about self-acquisitions.

The presumption in favour of the family institution has been solely relied upon by Vijnaneshwara in dealing with the right by succession. Jaimini's maxim of the three debts is the keynote and constitutes the nucleus of the elaborate principles developed by the learned commentators. The Hindu nation has faithfully and systematically followed these Vedic commands regarding sacrifice, learning and family institutions.

As regards the debt to gods, the life of every individual from birth to death is, at every stage impressed with a part-payment of this debt. A Hindu must be conceived in the 'womb with a sacrifice : learn to eat with a sacrifice ; begin the acquisition of knowledge with a sacrifice ; marry with a sacrifice, and die with a sacrifice. As regards the debt to the Rishis due for learning, the study of the Vedas leads to that of the Vedangas (branches of the Vedas), grammars, astronomy, music, medicine, and warfare. The debt due to the forefathers for perpetuating the family name leads to the practice of securing substituted sons of whom the custom of adoption alone is now prevalent. The Civil law of the Hindus is at every stage influenced by the principle of three debts. As regards the details of the debt of family institution, the Hindu Law enjoins various duties, such as, maintaining dependent members of the family, adopting a son, going to pilgrimage, living preferably in joint family and the like.

These presumptions have been so utilised that whenever two constructions of a text are possible, one tending to the discharge of one or other of the three debts, and the other inconsistent with such discharge, the former construction is to be adopted and not the latter.

The pervading influence of the family institution amongst the

Hindus is very conspicuous. Primarily the relationship is by blood but the tie is extended in various other ways. Members are conjoined by the tie of relationship as well as of religious duties. When a son is born, a father has to perform the Putreshti Yagya and, on his death, his son performs the Pitri Yajna (Sraddha). In the performance of religious sacrifices, the father, son, wife and, in fact, all the members of the family, and, in some cases, all persons belonging to the same *Gotra* and *Pravara* join together. Even a Sudra servant belonging to the family is regarded its co-member and Jaimini in connection with the rule as to the giving away of one's entire possessions lays down the principle ; "That a Sudra (servant) cannot be given away, for he is required by the Shastras for subserving the purposes of religion." [Jaim. VI. vii. 6] **शूद्रश्च धर्मशास्त्रत्वात् ।** He concludes the discussion by saying that the reason why a Sudra is debarred from sacrificial acts is that he is not open to teaching For some purposes even the preceptor and the pupil are regarded as members of the family. Thus the Hindu conception of a family is very wide indeed.

CHAPTER VIII

INTERPRETATION OF HINDU LAW BY BRITISH COURTS

It has been shown in the preceding chapter how Hindu Law has been interpreted by Jimutavahana, Vijnaneshwara and other ancient writers and commentators. Let us now consider how Hindu Law has been interpreted by the British Indian Courts. In spite of the fact that they did not know the difficult and obtruse classical Sanskrit language and the Mimamsa principles of interpretation, couched in Sanskrit, they have discharged their duties fairly well. At places they have erred in construing certain texts which will now be considered. But the mistakes notwithstanding, the cases decided by them, lay down authoritative law.

SECTION I. LAW RELATING TO HINDU USAGES AND CUSTOMS

It has already been shown that family and tribal as well as local customs relating to matters of *Pyayoga* and *Viniyoga*, i. e., matters of common life, have been recognised as valid both by Jaimini and the Smṛiti writers. Jaimini has also tried to maintain uniformity by means of *Holaka maxim* as regards the religious institutions of the Hindu community. The two *Adhikaranas* of Jaimini—the *Padārtha Prabalya Adhikarana* and the *Holaka Adhikarana* as regards custom are relevant and lead to important results as given below :

Only those local, family and tribal customs can prevail which are in consonance with the general principles of the Vedic law. Therefore, local customs and those belonging to particular sections of the community must be critically examined so that they may not jeopardise the general guiding rules of the society. The following cases are in harmony with those principles as laid down in the *Mimamsa Shastra* :

Customs in harmony with the Vedas prevail.

Decided case agrees with the Mimamsa principles.

A custom is a rule which, in a particular family or in a particular district has, from long usage, obtained the force of law. It must be ancient, certain and reasonable, and being in derogation of the general rules of law, must be construed strictly (a). A custom which

(a) *Hurpurhad v. Shoo Deyal* 3. I. A. 259, 26 W. R. 55.

has never been judicially recognised cannot prevail against distinct authority (b). If it is contended that the succession to property is regulated by any special family custom, that custom ought to be alleged and proved with distinctness and certainty (c). When amongst the Hindus some custom different from the normal Hindu Law and usage of the country in which the property is located and the parties reside, is alleged to exist, the burden of establishing its antiquity and invariability is placed on the party averring its existence, and it should be proved by clear and unambiguous evidence above suspicion (a).

The Mimansakas have clearly established by the Holaka maxim the condition that a custom or usage should be reasonable and certain and that it must be of some standing in order to be valid by the Padārtha Prabalya maxim; and the Drishtaheṭu maxim virtually requires that an usage in order to be valid must not be based on any corrupt motive, but it must be reasonable (e). These principles have been laid down in the following decided cases :

In order that a Hindu custom may have the force of law, it must be shown to have existed from time immemorial (f). In the Hindu system a well defined usage acquires the force of law (g). The prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place, stands on the footing of usage or custom of the family, capable of attaching and of being destroyed equally, whether the property be ancestral or self-acquired (h). Where a custom is proved to exist, it supersedes the general law, but the general law still regulates all beyond the custom (i). Custom not allowing adoption may govern a family not subject to Hindu Law. Even in a Hindu family there might be a custom barring inheritance by adoption (j). As regards immoral usages the wide rule is laid down in the Drishtaheṭu Adhikarāṇa to the effect that, if any gross motive be seen to underlie a Smṛiti text, that text is not good law, *a fortiori* usage based on immoral motives is not fit for enforcement (k).

Custom is transcendent law. In the third stage of the development

(h) *Narasamai v. Balarama Chaitu* 1 M. H. C. R. 420.

(c) *Sauman Umah v. Palatnan Vini Marya* (Coothy Umah) 15 W. R. 47 (P. C.); see also 17 W. R. 553 (P. C.); 14 M. I. A. 570; 5 I. A. 87; 1 All. 688.

(d) *Bhagandas Tejmal v. Rajmal* 10 B. H. C. R. 241.

(e) K. L. Sankar's *Mimamsa Rules of Interpretation* p. 464.

(f) *Luchmal Lal v. Monan Lal Bhaya* 16 W. R. 179.

(g) *Gunga Hamee v. Raghobram* 23 W. R. 131.

(h) *Surenaranath v. Heeromonee* 10 W. R. 35 (P. C.); 12 M. I. A. 81.

(i) *Neelkrishno Deb v. Beechunder Thakur* 12 W. R. 21 (P. C.); see also 5 All. 512.

(j) *Raja Bishanath Singh v. Ram Charan Masumdar* S. D. A. 1850, p. 20. See *Fanindra Deb Ratha v. Rajeshwar Das* 11 Cal. 463; 12 I. A. 72.

(k) *R. v. Karan* 2 B. H. C. R. 117; *R. v. Mandhar* 5 B. H. C. R. 17; *Uji v. Halhi* 7 B. H. C. R. 133; *Narayan v. Laving* 2 Bom. 140; *Mathura v. Esu* 4 Bom. 545; *Chyma Unmayi v. Tejaram Chelth* 2 Mad. 168.

of Hindu Law, the first two being the period of Sruti and Smriti, the same causes, *viz.*, expansion and growing needs of the Aryan community necessitated the recognition of a new source of law. By the further advance of time, the Smritis had ceased to satisfy the growing needs of men. Due to the changing conditions of their life, and as the works composed at the time did not command the same respect as the old Smritis, people turned to respectable persons of their community for guidance. Precept was not considered enough and people had to be guided by example. Thus came the authority of *Sadacharya*, the practice of good men which in course of time developed into custom. But the difficulty arose about reconciling certain bold excesses and transgressions of written law with the accepted authority of Smriti and Sruti. These relate to the stories about Prajapati, Indra, Vasistha, Draupadi and, *etc.* Apastamba justified these by suggesting that the great men of antiquity were possessed of superior human powers and as such were not subject to the same limitations as ordinary human beings. Kumarila adopts the bolder course. He explains the instances of transgression by treating some of the stories as more or less allegorical and others he puts in the light that renders them less objectionable. Again as regards the practice of the men of lore, Kumarila unhesitatingly declares that when we find any such practice distinctly contrary to law as laid down by the Sruti and the Smriti, we cannot accept it as authoritative, and his conclusion about the authority of precepts of good men appears to be that it is not all that a good man does that should be accepted as *Dharma*. It is only what he does and regards as *Dharma* that is to be so accepted. यद्वार्याः क्रियमाणं प्रशंसन्ति स धर्मः ।

Thus it is clear that originally only practices of good men were recognised as authority and that they were not in opposition to the provisions of Sruti and Smriti. Laterly, however, the study of Hindu Law would disclose that the centre of gravity of the authority due to the progressive spirit of our law shifted to one's own conscience.

आत्मनस्तुष्टिः [Manu] स्वस्य च प्रियमात्मनः [Yajn.]

It was only when the period of Nibandhas or digests and commentaries set in motion that custom began to be more and more recognised. Still the dictum remained that custom should be regarded as of equal authority to the Sruti itself.

देशाचारस्तावैव द्वौ विचिन्त्या ।

यस्मिन् देशे या स्थितिः सैव कार्या ॥

Thus we have seen that at least up to the eighth century, custom was relegated to a very subordinate position. Mayne has also arrived at the same conclusion. He propounds the theory that the groundwork of Hindu Law is ancient custom which existed prior to Brahmanism. He observes "My view is that Hindu Law is based upon immemorial customs which existed prior to and independent of Brahmanism ; that when the Aryans penetrated into India they found a number of usages, either the same as, or not wholly unlike, their own, that they accepted these with or without modifications rejecting only those which were incapable of being assimilated, *e. g.*, polyandry, *etc.* ; that when Brahmin writers turned their attention to law, they first stated the facts as they found them without attaching them any religious significance, and that the religious element subsequently grew up and entwined itself with legal conceptions and then distorted them in three ways : *Firstly* by attributing pious purposes to acts of purely secular nature ; *secondly*, by accomodating these acts to the rules and restrictions suitable to the assumed pious purpose, and *thirdly*, by gradually altering the customs themselves so as to further the special subjects of religion or policy favoured by Brahmanism." Mayne further observes, " If I am right in supposing that the great body of existing law consists of ancient usages more or less modified by Aryan or Brahmanical influence, it would follow that a mere fact that a custom was not in accordance with a Brahmanical code, would be no reason whatever why it should not be binding upon those by whom it was shown to be observed. This is admitted in the stroughest terms by the Brahmanical writers themselves." Mayne says that *immemorial usage is transcendent law*, and that holy sages were knowing that the law is grounded on immemorial customs embraced as the root of all piety and good usages, long established, [I, 108-110]. It may be said that Sir William Jones's translation of the verse in Manu I, 108 which was approved by Dr. Sarvadhikari (II Ed. 854) and by Mukerjee, J., in *Rajani Nath v. Nitai (a)* and by others, is an error. Dr. Buhler and Dr. Jha have given the correct translations. Dr. Buhler (in S. B. E Vol. 25, 27) says : " The rule of conduct is transcendent law whether it be taught in the revealed texts or in the sacred tradition : hence a twice-born man who possesses regard for himself should be always careful to follow it." Dr. Jha in his Manu Smriti Vol. I, Part I, p. 149 says : " Morality (right behaviour) is highest dharma, that which is prescribed in the Sruti and laid down in the Smriti. Hence the twice-born person, desiring the welfare of his soul should be always intent upon right behaviour." The reference is

(a) 48 Cal. 643, 715 F. D.

to right behaviour or conduct as laid down in the Vedas and in the Smritis and not to any customs or usages of the place. The verses 107, 110 of Manu Smriti read together establish the correctness of the above translations and have nothing to do with custom or usage in the modern sense.

Mayne also quotes the following verses of Manu [VIII, 41]: "A king who knows the sacred law must enquire into the laws of castes, of districts, of guilds and of families and (thus) settle the peculiar law of each."

जातिजानपदान् धर्मान् श्रेणीधर्माश्च धर्मवित् ।

समीक्ष्ये कुलधर्माश्च स्वधर्मं प्रतिपादयेत् ॥

It should be noted that Kulluka voices the accepted theory of the time when he comments that usages are valid if they be not repugnant to the law of God by which he no doubt means the texts of the Vedas as interpreted by the Brahmins. But Mayne says that Manu contemplated no such restriction as is evident by what follows a little after the above passage.

सद्भिराचरितं यत्स्यात् धार्मिकैश्च द्विजातिभिः ।

तद्देशकुलजातीनामविरुद्धं प्रकल्पयेत् ॥ [Manu VIII, 46]

यस्मिन् देशे य आचारो व्यवहारः कुलस्थितिः ।

तथैव परिपाल्योऽसौ यदा वशमुपागतः ॥ [Yaj.]

Mitakshara quotes texts to the effect that even ... practices expressly inculcated by the sacred ordinances may become obsolete and should be abandoned if opposed to public opinion. Thus, though we do not agree with Mayne, that from the beginning custom was given overriding authority over all other sources, we must admit that the propositions stated by him formed the law since the 8th century onwards.

A question arises as to whether an usage or custom can at all prevail when it is in conflict with an express text of Smriti. The commentators are of opinion that in case of such a conflict the Smriti text must prevail, as the established usage or custom is always presumed to have been based on some lost or forgotten text. When an express text is found opposed to an usage, its propriety is lost and the prevalent usage can no longer be supported as proper. The discussion as given in one of the Adhikaranas of Madhavacharyya's Jaiminiya-nyaya-mala-vistara well supports this proposition. It runs thus :

"In Southern India, there is a custom among the learned of marrying one's maternal uncle's daughter. This custom being in

conflict with an express text of Smṛiti prohibiting such marriage, the question arises whether it can be accepted as good evidence (of conduct approved by sacred law or not). It may be contended that it is good evidence like other established usages, but that is not correct because it is opposed to Smṛiti. The weight attached to the usage of the learned arises from the inference that it is based on Smṛiti (although an express text may not be traceable), but when there is an express text opposed to the usage the inference must give way."

यो मातुलविवाहादौ शिष्टाचारः समानवः ।

इतराचारवन्मात्वममात्वं स्मार्त्तबाधनात् ॥

स्मृतिमूलो हि सर्वत्र शिष्टाचारस्ततोऽत्र च ।

अनुमेया स्मृतिः स्मृत्या वाग्या प्रत्यक्षया तु सा ॥ [Jaimini Nayanala
2, 3, 5.]

It should, however, be observed that this view does not imply that an established usage, where it conflicts with an express text of Smṛiti, should be condemned by the king. The condemnation proceeds from the broader standpoint of Dharma, which has a religious reference but by reason of the existence of the established usage, conduct in consonance with it must be tolerated though not approved by the king. So Brihaspati says :—

"Local, tribal and family customs wherever they prevail from before must be respected; otherwise, the subjects become agitated, popular disaffection springs up, and the strength of the treasury (of the Government) suffer in consequence; (then giving certain instances of customs condemned by the Smṛitis, Brihaspati proceeds to observe), by such a conduct those (who pursue it) do not render themselves liable to expiation or punishment ;"

देशजातिकुलानां च ये धर्माः प्राक् प्रवर्तिताः ।

तथैव ते पालनीयाः प्रजाः प्रक्षुभ्यतेऽन्यथा ॥

जनापरकिर्त्तवति वलं कोषश्च नश्यति

* * * * *

अनेन कर्मणा नैते प्रायश्चित्तमार्हाः

and commenting upon these passages, Viramirodaya [Ch. IX] observes as follows :

"The author of Madanaratna says that the prescription of punishment and expiation for the performance of such acts in other Smṛitis applies to localities other than those specified in these texts. We are, however, of opinion that the visible harm such as popular discontent spoken of in the text indicates that the king should in no way inflict any punishment in such a case ; but the absence of expiation

has been spoken of with reference to social intercourse, and not with reference to purity in the life to come, for which latter purpose expiation is of course requisite, so that there arises no conflict with other Smritis. When conduct opposed to Sruti and Smriti extends over an entire locality: the sinfulness of the conduct loses its force of obstructing social intercourse (through excommunication), but its force of causing hell (*i. e.* misery after death) remains intact, because on a consideration of the preamble, the purpose of the texts quoted above being fulfilled on ascribing this meaning to them, it is improper to imagine an absolute want of guilt; hence it has been said by *Apastamba*: "*Local, tribal and family customs are authoritative when they are not opposed to sacred law.*" In the text, *viz.* 'those who follow customs handed down through successive generations and acted upon by predecessors incur no guilt thereby; not so with other people,' the expression 'incur no guilt' means 'do not become liable to excommunication and punishment from king'; otherwise, it becomes difficult to avoid conflict between these two texts "

"The introduction of political considerations is a very noticeable feature of these texts and the commentator therefore contends that although these considerations may be sufficient to induce the king not to punish those who follow these established usages condemned by the Dharmashastras, and although by reason of their wide prevalence no question of social ostracism can possibly arise as a punishment for infraction of Shastric injunctions, yet, in so far as they are opposed to express directions of Dharmashastras, they can at best be tolerated, but not approved. The conclusion, therefore, is that such customs or usages wherever they exist must be tolerated and recognised in the administration of justice but must not be recognised as affording any index of *Dharma* or commendable conduct and encouraged as such. Their Lordships of the Privy Council have laid down in the case of *Collector of Madura v. Mootoo Ramalinga* (o) that '*Under the Hindu system of law, clear proof of usages will outweigh the written text of the law.*' There can be little doubt that for all practical purposes, this statement is correct enough, although it may require some qualification, as indicated above, from a standpoint outside the scope of positive law. All that their Lordships should, therefore, be taken to have laid down is that an act or transaction in consonance with an established usage cannot be treated as illegal or void of legal effect merely because it transgresses a written text of Dharmashastra, and the position thus understood cannot possibly be doubted or assailed." (x)

(o) 12 M. L. A. 397, 436.

(x) Dr. Sen's Hindu Jurisprudence p. 17-20

"It should be mentioned that besides local, tribal and family customs, the existence of special customs among commercial classes was also recognised and the king was enjoined to give due weight to them in actions involving their consideration." (1)

SECTION 2. BROAD RULES OF CONSTRUCTION

I. *In Collector of Madura v. Mootto Ramalinga Sattupathy* (2) decided by their Lordships of the Privy Council, the following general rules were laid down :

1. *Clear proof of usage will outweigh the written text of the law.*

"The duty of an European Judge who is under the obligation to administer Hindu Law is, not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For under the Hindu system of law, clear proof of usage will outweigh the written text of the law."

2. *No weight should be given to texts from works unknown and of doubtful authority.*

"The industry and research of the counsel in the courts below have brought together a *catena* of texts of which many have been taken from works little known and of doubtful authority. Their Lordships concur with the Judges of the High Court in declining to allow any weight to these."

3. *Sanctioned usage may be evidenced by opinions of Pandits and decided cases.*

"The evidence that the doctrine for which the respondents contend has been sanctioned by usage in the south of India, consists partly of the opinions of Pandits, partly of decided cases. Their Lordships cannot but think that the former have been too summarily dealt with by the Judges of the High Court."

Following the above principles their Lordships observed :—
"Upon the whole, then, their Lordships are of opinion that there is enough of positive authority to warrant the proposition that according to the law prevalent in the Dravada country, and particularly in that part of it wherein this Ramnad Zemindary is situate, a Hindu widow, not having her husband's permission, may, if duly authorised by his kindred, adopt a son to him. And they think that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of Hindu Law, or upon analogies, real or supposed, between adoptions according to the Dattaka form, and the obsolete practice with which that form of

(1) Dr. Sen's Hindu Jurisprudence p. 17-20.

(2) 12 M. L. A. 437, 10 W. R. 17.

adoption co-existed, raising up issue to the deceased husband by carnal intercourse with the widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient treatises above referred to; and, in particular, by the Dattaka Mimansa of Vidya Narainsamy, the author of the Madhavyam; but as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention."

What their Lordships lay down in this case may be more fully put as follows :

(a) General texts which must necessarily be more or less obscure are to be construed, more with reference to the questions as to whether the texts have been received by the particular school, and how they have been applied and sanctioned by the usage of the people of that school, rather than with reference to the effect of the verbal construction of the texts.

(b) When a rule of law is positively determined on the basis of such a principle, considerations of analogy, real or fancied, between the texts in question and other texts which have become more or less obsolete should have no weight against such a rule.

(c) In determining the rule of law on the basis of the principle stated above, evidence of opinion of leading and learned men (Pandits) belonging to the community, and that afforded by the judicial opinions of gentlemen concerned in judicial administration should be accepted (iii).

Therefore, the principles laid down by their Lordships substantially accord with the principles of the Mimansa Shastra. The principle as laid down by Jaimini in the leading Sutra of the Padārtha Prabalyadhikarana — 'Without reference to causes, usages prevail', is quite similar to principles (a) and (b). The third principle (c) regarding the question of evidence, is in consonance with the principle under the heading *Sistachara* as laid down by the Mimansakas and the Smṛiti writers.

Some rules of construction have also been laid down in certain other important decisions on the question of interpretation of Hindu Law texts :

II. A special text or statute forming an exception to a general text or statute should be constructed strictly and applied only to cases falling clearly within it (a).

For instance, where a Hindu widow governed by the Mitakshara school of law, dies without issue leaving *stridhana* property, an adopted

(iii) K. L. Sarkar's *Mimansa* p. 444.

(a) *Gangadhar Bagla v. Hira Lal Bagla* 23 C. L. J. 372, 387-388. per. Mookerjee, J.

son of her husband taken in conjunction with another wife and a son of her husband born of the womb of a third wife inherit, as her husband's sapindas to her *stridhana* property, in *equal* shares.

Bridha Gautama lays down the general rule that an adopted son endowed with excellent qualities and an after-born son are equal sharers. Vasistha introduces an exceptional rule with regard to the inheritances to father's property, *viz.*, "if after he has been adopted, a legitimate son be born, then the dattaka shall obtain a fourth share."

It was held, by their lordships of the Calcutta High Court that this exception must not be extended to property inherited from step-mother. The judges observed :

"Consequently we should not extend its application to cases not only not comprised strictly within its letter, but undoubtedly beyond its true spirit : in this connection we may bear in mind that Hindu jurists, quite as English jurists (*b*) recognise the well known canon of interpretation that a special text or statute forming an exception to a general text or statute should be constructed strictly and applied only to the cases falling clearly within it ; the Mitakshara itself recognises the principle that where an exception exists to a general rule, the exception should be confined within the strictest limits, so as not to encroach unduly upon the rule (*c*)."

III. *The Hindu Law contains its own principles of exposition, and questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognised expounders (d).*

In a Calcutta case (*d*) the questions were, *firstly*, whether the expression 'bandhu' would be confined only to those three classes of *bhinna gotra* sapindas that were mentioned in the Mitakshara, or whether any new class of heirs could be introduced under it ; and *secondly*, whether the word sapinda should be understood in a wide sense to include every person related by particles of the body, or whether it should be understood in a restricted sense, so as to exclude from inheritance every one related through females beyond the fifth degree, and every one related through males beyond the seventh degree.

It was held, first, that the classes specified by Vijnaneswara cannot be added to ; and that the case of *Giridharilal Roy v. Government of*

(b) *Rebb v. Baulonis* (1875) L. R. 10 Ch. App. 479, 484 ; Co. Litt 299 a.

(c) *Gangu v. Chandra* (1907) 32 Bom. 275 ; *Anand v. Hari* (1909) 33 Bom. 404 ; *Dattaka Chandrika* Sec. V. 27 ; *Mitakshara on Prayaschitta*, Ed. Moghe, p. 281 ; वावत्सवाचिते अनुपत्ति प्रशमो न

भवति तावत्वाधनीयम् ।

(d) *Ramchandrar Marland Wasker v. Vinayak Venkatesh Kolhekar* 30 C. L. J. 573, 608-09 (P. C.).

Bengal (e) was no authority for the extension.

It was further held that the relation of sapinda ceases for purposes both of marriage and of inheritance after five degrees in case of relationship through females.

"The limitation of five degrees clearly applies and can only apply to the *bhinnu gotra* sapindas. But it is contended that this limitation is confined to prohibition in respect of marriage. As has already been observed, a part of the limitation appears to have been applied to the succession of *samanagotra* sapindas: their Lordships are unable to see on what principle it can be said that the other part relating to kinsmen who are equally sapindas, but belong to a different gotra must be restricted to matrimonial affinity.

In the absence of any authoritative text, their Lordships do not see their way merely on abstract reasoning to displace a view of the law which has received the recognition of the Courts in India and which the District Judge, an officer of great experience and learning says is accepted by "Public opinion."

IV. *Under the Dayabhaga School of Hindu Law a son is the preferential heir to married daughter to the pitridatta ayantuka stridhana property of the mother (f).*

The decision depended upon the meaning of the expression *Kunya*, given by Jimutavahana in connection with his quotation from Manu in Ch. IV. Sec. 2, para 16. It appears that Srikrishna and Raghunandan use the term as meaning daughter generally. But from Ch. V of the Dayabhaga it is clear that Jimutavahana used it in the sense of an unmarried daughter.

V. *The principle of Hindu Law, which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of the Hindu deity after the testator's death, nor does it make such a bequest void (g).*

On a construction of the expression दाने हि चेतनोद्देशविशिष्टस्यागादेव (Dayabhaga Ch. I. Para 21) and comments thereon, read with Shoolapani's and Raghunandana's discussions as to the nature of *sraddh* and gift, etc., it was held that the above principle of Hindu Law does not apply to such a bequest.

"The view that no valid dedication of property can be made by a will to a deity, the image of which is not in existence at the time of the death of the testator, is based upon a double fiction, namely, first, that a Hindu deity is for all purposes a juridical person, and, *secondly*, that a dedication to the deity has the same characteristics and is subject to the

(e) 12 M. I. A. 448.

(f) *Prasann Kumar Bose v. Sarat Shashi Ghosh* (1908) 36 Cal. 86 (F. B.).

(g) *Bhupati Nath Smritidhikha v. Ram Lal Madra* 37 Cal. 128 (F. B.)

same restrictions as a gift to a human being. The first of these propositions is too broadly stated, and the second is inconsistent with the first principles of jurisprudence."

"The Hindu Law recognises dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed *extra-commercium* and is entitled to special protection at the hands of the sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments."

SECTION 3. INTERPRETATION OF SPECIFIED TEXTS

The principles of interpreting text-law do not shut out the necessity of verbally construing the Sanskrit text of the Hindu Law. Where a certain text-book has been acted on, its words must be construed; specially when it is a regular treatise of comparatively recent times, such as, the Dayabhaga, the Mitakshara, the Mayukha, the Viramitrodaya, *etc.* The said principles rather open the door to the subject of verbal construction. The Privy Council as well as the different High Courts in India have resorted to such verbal constructions in settling particular points, of which some illustrations are given below :

In *Balwant Singh v. Rani Kishori* (i), their Lordships of the Privy Council construed these texts: (I) Clause 27, Sec. 1, (II) Clause 21, (III) Clauses 9 and 10 of Sec. 5 and (IV) Clauses 1 and 2 of Sec. 4 Ch. 1 of the Mitakshara as translated by Colebrooke :

I. Clause 27, Sec. 7, Ch. 1 runs as follows :

"Therefore, it is a settled point, that property in the paternal or ancestral estate is by birth, [although] the father had independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth: but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained, "though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should therefore, be made."

तस्मात् पैतामहे च द्रव्ये जन्मनैव स्वत्वम् । तथापि पितुरावश्यकेषु धर्मकृत्येषु
वाचनिकेषु प्रसादवान् कुटुम्बभरणपद्धि मोक्षादिषु च स्थावरव्यतिरिक्तद्रव्य
विनियोगे स्वातन्त्र्यमिति स्थितम् । स्थावरे तु स्वाजिते पित्र्यादि प्राप्ते च
पुत्रादि पारतन्त्र्यमेव ।

(i) 20 All. 267.

स्थावरं द्विपदं चैव यद्यपि स्वयमर्जितम् ।

असम्भूय सुतान् सर्वान्न दानं न च विक्रयः ॥

ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिताः ।

वृत्तिं च तेऽभिकांक्षन्ति न दानं न च विक्रयः ॥ इत्यादि स्मरणात् ।

II. Clause 21, rather than that part of Clause 21, which forms Vijnaneshwara's explanatory note to two Smṛiti passages, one from Yajñavalkya himself, and which is this:

"They both relate to immovables which have descended from the paternal grandfather." तत् पितामहोपासस्थावरविषयम् ।

III. Clauses 9 and 10 of Sec. 5 run as under :

"So likewise, the grandson has a right of prohibition, if his unseparated father is making a donation, or a sale, of effects inherited from the grandfather: but he has no right of interference, if the effects were acquired by the father. On the contrary, he must acquiesce because he is dependent."

"Consequently the difference is this: although he has a right by birth in his father's and in his grand-father's property, still since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property: but since both have indiscriminately a right in the grand-father's estate, the son has the power of interdiction [if the father be dissipating the property]."

तथा विभक्तेन पित्रा पैतामहे द्रव्ये दीयमाने विक्रीयमाणे वा पौत्रस्य निषेधेऽप्यधिकारः । पितृर्जिते तु न निषेधाधिकारः तत्परतन्त्रत्वात् । अनुमतिस्तु कर्त्तव्या । तथाहि पितृके पैतामहे च साम्यं यद्यपि जन्मनैव तथापि पैतृके पितृपरतन्त्रत्वात् पितुः स्वार्जकत्वेन प्राधान्यात् पित्रा विनियुज्यमाने स्वार्जिते द्रव्ये पुत्रेणानुमतिः कर्त्तव्या । पैतामहे तु द्वयोः स्वाम्यमविशिष्टमिति निषेधाधिकारोऽप्यस्तीतिविशेषः ।

IV. Clauses 1 and 2, Sec. 4 are as follows :

"The author explains what may not be divided, 'whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a father, or a gift at nuptials does not appertain to the co-heirs. Nor shall he, who recovers hereditary property, which had been taken away, give it up to the parceners; nor what has been gained by science."

"That which had been acquired by the co-parcener himself without any detriment to the goods of his father or mother or which

has been received by him from a friend, or obtained by marriage, shall not appertain to the co-heirs or brethren. Any property, which had descended in succession from ancestors, and had been seized by others, and remained unrecovered by the father and the rest through inability or for any other cause, he, among the sons, who recovers it with the acquiescence of the rest, shall not give up to the brethren or other co-heirs: the person recovering it shall take such property."

**मातापित्रोर्द्रव्याविनाशेन यस्त्वयमर्जितं मित्रसकाशात् यत्तत्त्वं विवाह-
लब्धं दाय्यादानां भ्रातृणां तन्न भवेत् । इत्यादि [Mitakshara]**

In the above-noted case the plaintiffs relied on clause I with the contention that an alienation by a father of self-acquired property is void, but the defendants relied on Clauses II, III and IV which were contradictory to Clause I:

Their Lordships after considering the contradiction decided the case as follows:

The effect of Clause 27 is that it does not negative the father's right to alienate his self-acquired property, but that it only shows that his alienation may not be morally right. In fact, their Lordships adopt Sir Francis Macnaghten's opinion on the point, which is also shown to have been adopted by Sir Thomas Strange, and substantially acted on by the High Courts of Bengal and Allahabad. Thus their Lordships do not exclusively proceed on the construction of the text, but also partly follow the principle laid down in the case of the Collector of Madura. This principle, however, which is, in substance, that of the Padārtha Prabalya Adhikarana, is perhaps not quite legitimately applicable to the case. For here, there is a well recognised text book of law, the Mitakshara, governing the parties which is pretty full and explicit. The construction of the text of this book should alone be decisive of the question raised.

The construction of these texts by their Lordships is in accord with the Mimamsa rules. At the outset, the words quoted by their Lordships from clause 21 section 1 should be eliminated from consideration, for the simple reason that these words are the words of the Purvapakshin (the party whose views are refuted) which are to the effect that the property is by succession and not by birth. Then coming to the text mainly in question, that contained in clause 27 section 1, is not obligatory by the well-known Mimamsa rule that what is recited as a reason does not of itself form an obligatory text. This principle is laid down in Hetubannigadadhikarana. This Adhikarana no doubt does say that the principal clause, in support of which a reason is given becomes bad for the recital. But it clearly says that what is recited as the reason is not itself obligatory. By the application of this maxim

to clause 27 it is clear that the clause "since it is ordained . . . , be made," has not the force of a Vidhi. Then, there remains the clause "But he is subject to . . . or other predecessor," which is to be read with the opening clause "property in the paternal or ancestral estate is by birth," by the Ekavakyata principle becomes subordinate and incidental.

Then against the above words, clauses 9 and 10 of section 5 are to be considered. Clause 27, treats ancestral and self-acquired property in general terms while clauses 9 and 10 constitute a special rule, making a distinction between ancestral and self-acquired property. Therefore, by the maxim, called the Samanya Vishesha Adhikarana, the special clause prevails over the general. By Apachheda maxim also clauses 9 and 10 of section 5 prevail over clause 27. By this maxim when there is a conflict between two passages in the same work the passage that comes after bars the one that precedes. Thus both by the Samanya Vishesha maxim and the Apachheda maxim, the clauses which lay down that, in respect of the self-acquired property of the father, the sons have no power to interfere with the disposal of it by the father, must prevail. Thus the right that a son acquires by birth in the father's self-acquired property is reduced only to a claim of maintenance out of it, so long as the father does not dispose of it. Jimutavahana also explains this claim of the son to be a moral or spiritual duty on the part of the father.

In *Sri Balusu Gurulinga Swami v. Sri Balusu Ramalakshmanamma and Radha Mohan* (representative of Beni Prasad) *v. Hardai Bibi* (x) the question as regards the validity or otherwise of the adoption of an only son turned upon the interpretation of the following texts (Vasistha) :—

The decision as to the validity of the adoption of an only son not in accord with Mimansa rules.

- (1) Man formed of uterine blood and virile seed proceeds from his mother and his father as an effect from its cause.
- (2) Therefore the father and the mother have power to give, to sell and abandon their son.
- (3) But let him not give or receive in adoption an only son.
- (4) For he must remain to continue the line of ancestors, [as he saves the man (from *pau* or hell)].
- (5) Let a woman neither give or receive a son except with her husband's permission.

शुक्रशोणितसम्भवः पुरुषो मातापितृनिमित्तकस्तस्य प्रदानविक्रय परित्यागेषु मातापितरौ प्रभवतः नत्वेकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा स हि सन्तानाय पूर्वेषाम् ।

(x) 26 L. A. 113, 21 All. 460, 22 Mad. 398, 9 M. L. J. 67, 1 Bom. L. R. 226, 3 C. W. N. 427.

The text of Saunaka is also important on this point : " One having an only son should never give him in adoption ; one having sons should give a son (in adoption) with every effort."

नैकपुत्रेण कर्त्तव्यं पुत्रदानं कदाचन ।

बहुपुत्रेण कर्त्तव्यं, पुत्रदानं प्रयत्नतः ॥

The passage of the Mitakshara or the Dattaka Mimamsa bearing on the point is not of importance as their authors professedly follow the texts of Vasistha and Saunaka. Manu has not said anything directly on the point. These passages will be considered later on.

Applying the Mimamsa rules, excepting the last sentence, the whole may be resolved into two main parts : the first part consists of the first two sentences laying down the Vidhi that parents have the power of selling their son : the second consists of the next two sentences laying down that the father must not either give away or receive an only son. In terms of the Mimamsa rule as to Vidhi and Paryudasa, the first proposition forms the general (rule *Samanya* Vidhi) and the latter an exception (*Paryudasa*). The result is that, a man can give away his son, except when that son is the only son. Each of the above two propositions can be divided into two parts : one mandatory and the other a reason for it. The general Vidhi laying down the rule, that a father has power to give away his son, is supported by the reason that he, along with his wife, is the cause of his birth. The reason is an Arthavada or a mere explanation. The exceptional clause also is supported by a reason, and that reason too is an Arthavada. Some allege that the statement of a reason vitiates the Vidhi in support of which the reason is stated. If it were so, then, in this case, not only the exception would go out, but even the general rule laying down the power of the parents to give away their sons. There is no valid basis for the above proposition, the Drishta Adhikarana states that a corrupt reason invalidates a Vidhi. By Hetubannigadadhikarana the reason stated is not to be taken as a condition precedent of the Vidhi, it is no more than a mere recital. The question, however, yet remains, whether the particular character of the reason stated in this case for the exception does not reduce to a nullity the exception itself. The reason " that an only son is required to continue the line of ancestors of the family in which he has been born," is not a corrupt one within the meaning of the Drishtahetu Adhikarana. Their Lordships of the Privy Council held in the above case that the proposition prohibiting the giving or taking in adoption of an only son is a mere religious or moral prohibition, and has not the force of positive law.

It has been said before that Drishtahetu Adhikarana takes exception to some worldly reasons, and would not permit such worldly

reasons to serve the purpose of proper spiritual reasons. This Adhikaran relates mostly to the positive Smṛiti Law, so it maintains the superiority of spiritual reasons with regard to the positive law. Vijnaneshwara and Jimutavahana also hold that when a spiritual rule clashes with an established rule of the Vyavahara Law, the former would be taken as merely a monetary precept. Sankara Bhatta while dealing with the principal Badha lays down that, where an Utpatti Vidhi conflicts with a positive Smṛiti Vidhi, the latter bars the former. These authors do not even say that when a spiritual rule and a rule of Vyavahara law harmonise with a spiritual reason, both are to be rejected as being monetary precepts. Vijnaneshwara says that according to Gautama's Smṛiti text, a man has a proprietary right to a thing which he acquires for secular use. A priest requires a thing by officiating at a sacrifice. So he has a right of property to the thing by the positive (Vyavahara) law. But there is a rule of the spiritual law, according to which, he should not have acquired this property. Vijnaneshwara says that this spiritual rule cannot be taken to interfere with the rule of positive law. It must be taken to be a mere religious precept, for the breach of which the man may expiate in the best way he can, but not by losing his proprietary right. This is a case of conflict between the positive and the spiritual law (a).

Similarly, the well-known rule of *Factum valet* of Jimutavahana may be referred to. He has clearly laid down that a person can use his self-acquired property in any way he pleases. But a text of Vyasa says, a man should not sell or give away immovables and bipeds acquired by himself. He holds it to be a moral precept and a transaction done in violation of it must hold good. This is the conflict. But in the present case of prohibition of the gift of an only son it is admittedly a matter of the positive (Vyavahara) law, coupled with the spiritual reason. Both are concordant and there is no clash. Therefore, according to Jaimini or Vijnaneshwara and Jimutavahana the said proposition cannot be treated as merely monetary. Mere spiritual reason cannot reduce a Vyavahara Vidhi to a monetary precept for in that case the rules of succession laid down by Jimutavahana would all be reduced to mere monetary rules.

Their Lordships of the Calcutta High Court did not well consider Mr. Justice Mitter's observation in the case of *Rajah Upendra Lal v. Srimati Ram Prasanna mayi* (b).

"The institution of adoption as it exists among the Hindus is essentially religious institution. It originated chiefly, if not wholly, from motives of religion; and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and

(a) K. L. Sarkar's *Mimamsa* Rules p. 456.

(b) I B. L. R., 191.

temporal aspects are wholly inseparable." 'By a man destitute of male issue' one, says Manu, 'must be substituted for a son of some one description for the sake of the funeral cake, water and solemn rites.' The subject of adoption is, therefore, inseparable from the Hindu religion itself and all distinction between religious and legal injunctions must be inapplicable to it.

Vijnaneshwara follows Vasistha's text and says: "So an only son must not be given [nor accepted]." For Vasistha ordains "Let no man give or accept an only son." (Colebrooke's *Mitakshara* Ch. I. Sec. 11. Para 11). तथा एकपुत्रो न देयः । न त्वेवैकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा । इति वशिष्ठस्मरणात् ।

The meaning of the word '*na deyah*' which has been translated into 'must not' has been suggested to be 'should not.' The words of Vasistha form a part of the same sentence, so the force of the word should be determined by the principle of Vakya (reading together). This being so the proper force of the said words is 'must not' and not 'should not.'

Let us now consider the text of Saunaka as considered by Nanda Pandit in the Dattaka Mimansa. The words are '*nakartavyam*' 'not to be made,' might, no doubt, be taken to mean 'should not be made.' But in that case the Vakya principle will be violated. The word '*Kadachana*' which means 'in no case,' read with the words, 'should not be made,' makes the sense to be one of unqualified prohibition.

The Mimansa principles thus show that the interpretation put on the texts in consideration by their Lordships of the Privy Council is not correct; whatever the fact may be, the decision of the highest judicial tribunal has put an end to all discussions upon it (c).

In *Bhagwan Singh v. Bhagwan Singh* (d) their Lordships of the Privy Council decided the following

Adoption of mother's sister's son and that of daughter's and sister's son invalid.

matters :—

(1) The adoption of a mother's sister's son by a Hindu of any of the three regenerate classes, Brahman, Kshatriya, and Vaislya, equally with the adoption of a daughter's son, or a sister's son is contrary to law and void. The ancient texts condemning such adoptions are not only admonitions, but have been judicially decided to be prohibitions of law for such a length of time that it is not now competent to a Court to treat them as open to question in this respect.

(2) The Judgment in the *Collector of Madura v. Mutoo Ramalinga Sathapathy* gives no sustenance to the conclusion that in order to bring a case under any rule of law laid down by recognised authorities for Hindus generally, evidence must be given of actual events to show

(c) K. L. Sarkar's *Mimansa* Rules p. 459.

(d) 26 L. A. 153, 22 All. 412.

that, in point of fact, the people subject to that general law, regulate their lives by it.

The first point as decided by their Lordships and the position taken by them is unquestionable. 'If texts as to the character of which doubts might be raised touching the question whether they were obligatory or recommendatory, have been judicially acted upon for a long time as obligatory, then even by the Mimamsa principle laid down in the Padārtha-Prabalya maxim their obligatory character cannot be denied. The principal text which was the subject of consideration in this case is that of Saunaka, in a part of which the rule regarding the adoption of an only son also occurs.'

Nilakantha by applying Mimamsa rules says that Saunaka does not recommend the exclusion of such relations from adoption. But Sakala's text is stronger to show that these relations are ineligible for adoption. Dattaka Mimamsa and Dattaka Chandrika, the leading treatises on adoption, held in high esteem from a long time, submitted to the authority of Sakala. However, the meaning of Sakala's text should not be extended beyond its words; and, also the extensive effect ascribed by some to the words 'having the reflection of a son' in the passage of Saunaka should not be tacitly accepted as proper. The operation of that text cannot be extended by analogy or on the basis of the reasoning that may be supposed to underlie it. Sakala would except daughter's son, sister's son and the son of mother's sister. The exception cannot be extended to the son of mother's sister, nor to the son of any woman whose father was of the same gotra with the would-be adopter. Such an extended exclusion was sought to be introduced by the words "having smelt the forehead of the child, and having with clothes and the like adorned the boy bearing the reflection of a son, *etc.*" These words only go to show how the adopter is to do certain acts towards the boy, and how the boy would appear when these acts are being performed, *viz.*, that he would *bear the reflection of a son*. This clause cannot be detached from its place to make it serve the purpose of a Vidhi to the effect that he should be born of the womb of a female other than of the same Gotra (a). Nanda Pandit's dictum starts a new idea which is not to be found in Saunaka's passage. But this idea is against Nanda Pandit's own argument against Medhatithi that the question of procreation has nothing to do with the question of the substitution of a son. Their Lordships of the Privy Council in the case of *Bhagwan Singh v. Bhagwan Singh* held that the adoption of the mother's sister's son is invalid and also a *fortiori* held the adoption of the daughter's son and sister's son to be invalid among the three higher classes.

(a) See Mandlik's Book D. 47A. II. 7-18.

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HINDU LAW

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JURISPRUDENCE

WITH

MIMANSA RULES OF INTERPRETATION

VOLUME I

BY

KASHI PRASAD SAKSENA, M. Sc., LL. B.,

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PRELIMINARY

INTRODUCTION TO THE STUDY OF HINDU LAW

SECTION I. GENERAL OBSERVATIONS

The discovery of Kautilya's *Artha Sastra* has ultimately proved the Hindu system of jurisprudence to be the oldest in the world. Naturally, therefore, other systems may well have been influenced by it. The later Roman system of law bears striking resemblance to the Hindu system. The difference is attributable to the conditions of the two societies and the stages through which the Hindu system has passed. Whatever the differences and dissimilarities, the unity of human constitution and the universality of human reason concur in producing an essential similarity in all those systems which exhibit themselves to a scientific observer amidst the diversity of details. Book I dealing with the subject 'Hindu Jurisprudence' shows the comprehensiveness of the Hindu Law, loftiness of its ideals, its logical consistency, its reasonableness, its regard for the interest of the community as a whole and also the practical insight and the depth of outlook of our law-givers. Sir Francis Macnaghten remarks, "The merit of having been the founders of their own jurisprudence cannot be denied to this people; and, those who are at all conversant with the decisions of our own courts will acknowledge the analogy which exists between some of their doctrines, and some of the texts which I have cited from the Hindu Law. Where this is not to be found, a comparison may in several instances be made without disadvantage to the Hindus."

The difficulties involved in tracing the obscure history of the system, more than 3,000 years old now, and the existence of the treasures of law couched in old classical Sanskrit language have rendered very difficult the task of giving an exact estimate of Hindu Law. Hindu Law is in essence a purely religious law which has never been secularized and *the Smritis are our sole repository of law*. J. H. Nelson remarks, "Has such a thing as 'Hindu Law' at any time existed in the world? or is it that Hindu Law is a mere phantom of the

brain, imagined by Sanskritists without law and lawyers without Sanskrit? It must not be believed that the innumerable Hindu tribes and castes of India have at any time agreed to accept, or have been compelled to guide themselves by, an aggregate of positive laws or rules set to them by a sovereign or other person having power over them. In other words: looking at 'law' from Austin's point of view it is true that law has at no time been known to the so-called Hindu population of India. There is not, and so far as appears never has been, a Hindu nation or people, in the proper sense of the term: and it would be idle to attempt to discover by research a body of positive laws based in the general consciousness of such a nation or people. But probably during many centuries, there has existed in most parts of India a larger or smaller community of persons that might strictly and properly be styled 'Hindus'. The aggregate of those communities might strictly and properly be styled the "Hindu community" or "fraternity". And if it were to be ascertained that, after striking out unimportant local and tribal peculiarities of usage and custom, there remained appreciable aggregate of ideas of law common to all or most of the constituent parts of that community or fraternity, that *residuum* might strictly and properly be called 'Hindu Law'."

"I think it is improbable in a very high degree that a considerable *residuum* of the kind could be discovered; but whether I am right in so thinking at present is immaterial. What passes in our courts for 'Hindu Law' is a thing that does not at all resemble or profess to resemble our considerable *residuum*. It does not sufficiently take into account the patent fact that the usage, manners and customs manifested in different parts of India are very variant. It does not concern itself, or concerns itself very little, with the question, who are or who are not Hindus? Ordinarily it does not attempt accurately to distinguish laws from customary observances from sentiments or from philosophic meditations. What then is the 'Hindu Law'?"

"In effect 'Hindu Law' is an aggregate of discrepant and inconsistent guesses, made by unsympathetic persons wholly ignorant of Sanskrit, at the meaning of generally imperfect and sometimes questionable translations of mutilated Sanskrit texts, themselves of doubtful authenticity, taken at random from purely speculative and religious treatises on what ought to be the rules of conduct for an ideal Arya community."

There is thus no wonder that English scholars have been unable to bring themselves to believe that law, as such, has at any time been known to the Hindu population of India.

According to Austin, it is the body of commands issued by the

rulers of political society to its members which lawyers call by the name 'law.' We hear our critics exclaim : Manu cannot be supposed to have set laws to India and if Manu did not set laws to India who else can be supposed to have done this ? If Hindu Law is a mere phantom of the brain imagined by Sanskritists without law and lawyers without Sanskrit, it appears to stand to reason that the schools of Hindu Law can have no legal existence. The reasoning apparently is faultless.

Hindu Law does exist and has existed for upwards of at least three thousand years and has governed the Hindu society in the same sense in which the statutes of the British Parliament govern the subjects of the British Empire. Laws enacted by ancient sages under the authority of spiritual brotherhood were binding upon the members of those societies. The powers of the political societies, *i.e.*, the sovereign and the religious fraternities were tested in groups of men who exercised them. Gautama and others are said to have been the original founders of the fraternities and were presidents of small republics, whose word was law to those who paid them homage, and owed fealty to the president of the political association, who was virtually the sovereign of the political society.

These were the original schools of law upon the remains of which the present schools are founded. According to Elphinstone, Kerala was from the first possessed by Brahmans, who divided it into sixtyfour districts and governed it by means of a general assembly of their caste renting the lands to men of inferior classes. The executive Government was held by a Brahmin elected every three years and assisted by a council of four of the same tribe. The laws administered by this council were the codes of Manu and Yajnavalkya.

Ancient India was governed by the laws which Manu, Yajnavalkya, Gautama and Brihaspati had framed. Local usages may have modified those laws to suit the circumstances of the districts in which they were administered. The sovereign of the district gave his sanction or rather adopted the ancient Codes.

If we remember that law was originally promulgated by the "spiritual brotherhoods", adapted by political associations and administered by real live sovereigns, it would not be possible to maintain that the Hindu Law is a phantom of the brain and ought to be relegated to the regions of the limbo, "a limbo large and broad so called the paradise of fools."

To a reader of Dharmasutras, and metrical Smritis, which according to Max Muller are the metrical reductions of original Dharma Sutras, it will be clear that the laws promulgated by the Smritikars and commented by commentators, not only affected or were meant to affect the members of

Real nature of Hindu Law.

the four classes. They extended also to the aboriginal tribes which inhabited India prior to the advent of the Aryan settlers. Taken as a whole, Hindu Law may in fact be affirmed to consist of a very large number of usages and a set of customs reduced to writing pretending to have divine authority and exercising consequently a great influence over them.

According to Mayne, (1) Hindu Law is based upon immemorial customs, which existed prior to and independent of Brahmanism.

Mayne's view.

(2) When the Aryans penetrated into India, they found there a number of usages either the same as, or not wholly unlike, their own.

(3) They accepted these with or without modifications rejecting only those which were incapable of being assimilated, such as, polyandry, incestuous marriages and the like.

(4) The Brahmanical writers simply stated the facts as they found them without attaching to them any religious significance.

(5) The religious element subsequently grew up, and entwined itself with legal conceptions, and then distorted itself in three ways: (i) by attributing pious purpose to acts of purely secular nature; (ii) by clogging these acts with rules and restrictions suitable to the pious purpose; and (iii) by gradually altering the customs themselves, so as to further the special objects of religion and policy favoured by Brahmanism.

Mayne fortifies his arguments by assuming that the chief and distinctive features of the Hindu Law, the undivided family system, the order of succession and the practice of adoption are not Brahmanical in origin. The joint family, he says, is only one phase of that tendency to hold property in comity which it is now proved was once the ordinary mode of tenure. Joint ownership is not limited to the Hindus or even Aryan races, but is to be found in every part of the world where men have settled to an agricultural life. The case of inheritance, according to him, is even more strongly in favour of the same view. Among the Hindus of the Punjab the order of succession is determined by custom and not by spiritual considerations. Throughout the Presidency of Bombay numerous relations and especially female relations to whom no ingenuity can ascribe the slightest religious merit, inherit. Of course the consideration of spiritual benefit is strictly observed in Bengal. The law of adoption is fully appropriated by the Brahmans though this system is not peculiar to Hindus and even the Jains and Muslims of the Punjab and North-Western Provinces practise adoption without the slightest reference to religious purposes.

We may give due weight to Mayne's view; still it may be asserted that the existence of similar family systems in other communities or

other countries is not the sole ground for regarding Hindu Law as based upon immemorial custom. The dawn of Brahmanism itself is lost in hoary antiquity and to say that *any well developed customs existed in those primeval times so as to form the basis of the highly spiritual system of Hindu Law may not be a very sound assertion.*

The unit of ancient societies was a *family*, and Indo-Aryans were not an exception to this. Every family had its own patriarch. In India this patriarchal system existed in the form of *Gotras* or groups of persons connected with each other in their descent to a common ancestor, after which the family name was given to the group and the persons described as belonging to that Gotra. There were *seven such principal Gotras* in the beginning named and known after the seven original *patriarchs or Rishis* who came over to India from the *regions* which lie to the North-West beyond the Mountain chains, together with their families or clans. The expression *Kul-Guru* characteristically used with reference to the patriarch is expressive of the idea of a clan or *Kul*. These Gotras were themselves divided and sub-divided into several others, and each of them was known generally by the original head, and particularly by the head or heads of branches to which it belonged.

Hindu joint family a direct remnant of patriarchal system known as the Gotra.

The joint and undivided Hindu family is thus a direct remnant of the patriarchal system known as the Gotra. All the essential elements of a patriarchal group, *viz.*, (1) the supremacy of the eldest male, (2) the agnatic kinship and the resulting law of inheritance, and (3) the ancestor-worship, are present in this system; and (4) the Indian group has even an additional characteristic which marks it off from other patriarchal groups, *viz.*, the qualified exclusion of women from the rights of inheritance and (5) the gradual development of the joint family system.

Hindu Law has followed a course of development as the laws of other nations have, and its growth has not yet been arrested. The conflicting doctrines and the jarring elements which are complained of can all be explained by the circumstance that they were not the creations of the same age but came into existence in different ages to suit different conditions of society in different areas. Until the erroneous belief that Hindu Law has been "built in a day" and the mistaken notion that the past history of Hindu law is veiled in obscurity, is totally exploded. Hindu Law for a long time yet will have to struggle against ignorance and misconception. Ignorant intermeddlers will declare it to be a non-entity. Industrious students who are sincerely desirous to understand

Development of Hindu Law.

the true nature of Hindu Law may, therefore, be staggered in their researches but their duty lies in going ahead, undaunted by obstacles and pitfalls.

If the eminent jurists of the day and the learned judges of our courts will husband the meagre resources at their command, compare and contrast the doctrines of the different schools and then subject them to a searching analysis by applying to them the recognised general principles of Hindu Law, in order to clear up the dark passages which have puzzled and confounded both the judges and the lawyers of the British Indian Courts, the landmarks in the history of the development of Hindu Law and its different stages should be clearly visible and accessible. Those who complain about the absence of the 'historical materials' ought to consider that a literature which abounds in the richest materials in all conceivable branches of knowledge, cannot fail to furnish us with facts, on which by a process of scientific analysis and generalisation, a satisfactory history of Hindu Law could be compiled. The task is certainly worth attempting.

Dr. Burnell has given three periods of the study of Hindu Law, and says :

"There have been three periods in the study of Hindu Law by foreigners: *First period*, that of enquiry from the middle of the seventeenth century to 1820. The earlier works by Baldaens, Halhed and others are forgotten, and Sir W. Jones is only remembered by his having drawn attention to the subject. Colebrooke and his followers are the only ones who rendered real services to the science.

"The *second period* began when Colebrooke had left India, and lasted till recently. In it English lawyers without any preparation for the task, attempted to systematise the materials they could find (whether good or bad, they did not seem to care) and these they interpreted by European notions, and introduced incongruous foreign ideas wherever they could. All that did not square with the preconceived notions of these 'elegant' jurists was denounced as imposture and corrupt forgery, and this period is marked by a vigorous but entirely unfounded denunciation of the Pandits.

"The *third and last period* has only commenced quite lately, and was promoted by the late Professor Goldstucker. It is marked by critical new editions of the old standard translations by Colebrooke and others, and by critical editions of texts and an enquiry into the sources and growth of Hindu Law. The progress of this new school is slow but sure, and for the sake of the people of the country it is to be earnestly desired that the false science of what has been termed the 'second period' may soon become a matter of history. The Sanskrit law is part

of the religious system of the Brahmans, just as Jews and Muhammadians have laws of inheritance, *etc.*, as part of their religion (a)."

It would be proper to consider the expression 'Hindu Law' with special reference to Mimamsa rules and to discuss the criticisms of that expression by Western jurists. **The term 'Hindu Law' with reference to Mimamsa rules.** *Law* or *Positive Law* as defined by the leading Western jurists, is a command issued by a *Sovereign* who is politically superior, to *subjects* who are politically inferior, imposing an obligation or *duty*, attended by a penalty or *sanction* in case of breach or disobedience; and the capacity of an individual to induce the sanction of the state in cases of neglect or breach of duty is called that person's *right*. The Western system is thus distinguished by this element of enforcement by a sovereign or political authority from all other rules whether enforced by a determinate or indeterminate authority. As Hindu Law is based on divine commands or the expositions of holy sages, the accuracy of the expression 'Hindu Law' has been said to be wanting in the political sanction by modern jurists. Austin's theory, as given above, cannot, therefore, be safely applied to societies which existed and had their self-established institutions long before that theory saw the light of day.

The old venerable sages, the Smritikars, professed to follow the divine laws as found in the Vedas and claimed to interpret and explain them to the general public, but in fact they so moulded the Vedic laws as to bring them into conformity with the general sense of their followers. The veneration, their character and renunciation evoked, secured them a universal following which was no less strong than political authority. This development of Hindu Law compares with English equity and Roman praetorian legislation which passed through similar stages of formation.

The true character of Hindu Jurisprudence appears to be different from that of European system but the difference disappears if the true origin of laws is properly considered. In both the systems, the King or the political head never lays down the laws himself but it is only with his signature and seal that the laws laid down by private individuals are issued to the public with imprint of political sanction. The only difference between the two is that in the Western system the authority is previously given for the purpose while in the Hindu system the political sanction is affixed subsequently.

One cannot follow the true character of Hindu Law without understanding the constitution of the Hindu society which includes several classes of people known as *Varnas*. "The rules and regulations

for a satisfactory management of such a society and representing the corporate sense of the entire body politic were evidenced in the usages of the people which were strictly adhered to and obeyed. Any infraction of these rules was met with by a punishment, the forms of which varied under different circumstances. Whether reduced to writing or enshrined in the memories of the people, these rules represented the corporate commands of the whole community. The class whose function it was to preserve them either by reducing these to writing or by storing them in memory performed this part of its duty faithfully and at considerable trouble and sacrifice. It never arrogated to itself the authorship of any of these. The Vedic sages to whom particular groups of hymns were assigned called themselves the seers *ऋषयः* and not the makers *कर्तारः* thereof. The kingly or the ruler class was assigned the task of enforcing obedience to these. Thus while to the *Brahmans* was assigned the task of recording the corporate commands and of preserving them, the warrior or the *Kshatriya* class represented the executive part of this mechanism (a). It was its business to see that these laws were obeyed and to enforce obedience in cases of infractions. There is thus a common basis for all laws, whether Eastern or Western." (b)

"A consideration of the expression *Dharma Sastra*—commands which are binding—will indicate the existence of the essentials of law as expounded by Austin. For a proper understanding of Hindu Law, a study of Hindu Sociology is necessary. 'That law is a jurisprudence by itself and contains within its limits all the principles necessary for application to any given case.' (c) A study of the Hindu society will disclose the existence of several machineries for the enforcement of the commands under different conditions." (b)

"No doubt, the analysis of laws given above relates to a time and stage when the Hindu society was in its full vigour. As time advanced, the ancient origin of these laws was forgotten and the instruments employed for their preservation or enforcement came to be regarded as the authors or makers thereof. Thus, while to a student of law the history of these laws reveals a healthy form of Government on democratic or popular basis, a superficial observer turns away from it, with the remark that such a system cannot be called a law." (b)

Till about the eighties of the last century two views as regards the nature and origin of the Hindu Law were prevalent: (1) One view was that it was legislation by sages of semi-divine authority, so to say, ancient legislative

(a) *Manu* VIII, 1; *Yajñavalkya* II, 1-2. (b) J. R. Gharpure, *Hindu Law* p. 3.
 (c) *Kalyanda v. Somappa* 33 Bom. 669, 680.

assemblies (a) and (2) the other view was that the Smṛiti law "does not, as a whole, represent a set of rules even actually administered in India. It is, in great part, an ideal picture of that which, in the view of the Brahmins, *ought* to be the law (3). Or, that Hindu Law is the law of the Smṛitis as expounded in the Sanskrit commentaries and digests which, as modified and supplemented by custom, is administered by the courts (c). Thorough researches have proved beyond doubt that the earlier view set forth above is not correct. S. Srinivasa Iyengar says:

**Basis of
Smṛitis.**

"The Smṛitis were in part based upon actual usages existing at the time or theretofore and, in part, on rules framed by the Hindu jurists and rulers of the country. They did not, however, purport to be exhaustive and, therefore, provided for the recognition of the usages which they had not incorporated. The much later Commentaries and Digests were equally the exponents of the usages of their times in those parts of India where they were composed (d). And in the guise of commenting, they developed and stated the rules in greater detail, differentiated between the Smṛiti rules which continued to be in force and those which had become obsolete and incorporated also the new usages which had sprung up." This is an exact and correct estimate of Hindu Law.

In the Brahmana and Sutra periods, the Aryans were not only devoted to *Dharma* but also to *Artha*, the science of politics, jurisprudence and the practical aspect of life. But with the extinction of the *Arthashastras* the history of the period became obscure and correct estimate of the origin and nature of Hindu Law could not be made. The fact that these renowned Arthashastras have now been found out and discovered by eminent research scholars has thrown a flood of light on the ancient Hindu life, society and culture. Vishnugupta, popularly known as Chanakya or Kautilya, was the author of an Arthashastra and flourished

(a) P. C. Tagore, Preface to Vivada-chintamani; Sarvadhikara p. 125-127 2nd Ed.

(b) Maine "Ancient Law" pp. 17-18; Nelson's View of Hindu Law—Preface and Ch. I; Nelson's Scientific Study of Hindu Law.

(c) Mayne's Hindu Law and Usage 10th Ed., p. 1.

(d) "The truth is that commentaries and digests like the Mitakshara and Viramirodaya owe their binding force not to their promulgation by any

sovereign authority, but to the respect due to their authors, and still more to the fact of their being in accordance with prevailing popular sentiment and practice. Their doctrines may often have moulded usage but still more frequently they have themselves been moulded according to prevailing usage of which they are only the recorded expression." *Jogdamba Koor v. Secretary of State* 16 Cal. 367, 375; *Maharaja of Kolhapur v. Sundaram* 48 Mad. 1, 65; Ganapathi Iyer, pp. 203, 204.

in the time of Chandragupta. The work was written in the interests of the Maurya Sovereigns and consisted of 6000 slokas. It deals with Indian polity, land system, fiscal system, law and its administration, social organisation and depicts a faithful picture of the various aspects of the then existing society. Books III and IV are of great importance as to the history of Hindu Law. In the Cambridge History of India, Dr. F. W. Thomas makes it the basis of a chapter on the social and political organization of the Maurian empire under Chandragupta (321 to 298 B. C.). Opinions differed till recently as to its authorship and date, but now it has been almost conclusively proved that it was *the work of Kautilya* written about 300 B. C. as shown by Dr. R. Shamasastri, Dr. Fleet, Dr. Jacobi, Dr. R. K. Mookerjee, Dr. Jayaswal and P. V. Kane (a).

Whatever might have been the authority of this Arthashastra in ancient times, it cannot be so regarded in modern Hindu Law. It was subsequently superseded by Dharmasastras (b). It is evident from Yajñavalkya Smṛiti, II. 21, that the Dharmashastra prevailed over Kautilya's Arthashastra.

"The outstanding facts that emerge from a study of Book III are that the caste and mixed castes were already in existence, that marriages between the castes were not uncommon and that the distinction between the approved and the unapproved forms of marriage was a real one. It recognises divorce by mutual consent except in respect of Dharma marriages. It allows re-marriage of women far more freely than the later rules on the subject. It contains detailed rules of procedure and evidence based on actual needs. While it refers to the twelve kinds of sons, it places the 'aurasa' son and the son of the appointed daughter on an equal footing, and declares that the 'Kshetrāja' and the adopted son as well as the other secondary sons are heirs 'to him who accepts them as his sons' and not to his collaterals. It recognises *anuloma* unions and shares are provided for the offspring of such unions, but it disallows *pratiloma* unions. A 'parasava' son begotten by a Brahmin on a Sudra woman was entitled to one-third share. It did not recognise the right by birth in ancestral property, for, like Manu, it negatives the ownership of sons whose parents are alive. It provides that when there are several sons, brothers and cousins, the division of property is to be made *per stirpes*. The grounds of exclusion from inheritance were already known. Its rules of inheritance are, in broad outlines, similar to those of the Smṛitis; while the

(a) Shamasastri, Introduction; P. V. Kane, 99; N. N. Law's Ancient Hindu Polity, Introduction,

(b) Dr. Jolly. Artha. Introduction. 20; Jayaswal's Manu and Yajñavalkya 68, 235,

daughter is recognised as heir, the widow is not; and the sapindas and the sakulyas, and the teacher and the student are recognised as heirs. It does not recognise trial by ordeals." (a)

It is established by Arthashastra and Dharmasastras that the King was the fountain-head of all justice (r). Besides the King, a court of ultimate resort, there were four courts, (1) the King's court, presided over by the Chief Judge with the help of assessors (b), (2) *Puga*, (3) *Sreni* and (4) *Kula*. These last three, though not appointed by the King, were not private arbitration boards but customary tribunals and their authority was fully recognised (c). Practical rules of interpretation, rules of equity, rules of procedure and pleading, were laid down in detail (d). The eighteen titles of law and their rules appear to have met the needs of the early Hindu society. Brihaspati states that there are four kinds of laws that are to be administered by the King in deciding a case: "The decision in a doubtful case is by four means, Dharma, Vyavahara, Charitra and Rajasasana." *Dharma* refers to moral law or rules of justice, equity and good conscience. *Vyavahara* refers to civil law as laid down in the *Smritis*. *Charitra* refers to king's edicts or ordinances. Authorities have agreed that this is the correct interpretation of Brihaspati's text and they also hold that *Rajasasana* is of paramount importance.

After the establishment of the Mahomedan rule in India, *Smriti* law continued to be recognised as before, excepting the Hindu criminal law. The two encyclopaedic works of this period on Dharmasastras are: (1) By Nrisinha-prasada, who was minister of the Nizamshahi dynasty of Ahmednagar in the 16th century and (2) Todarananda by Todarmalla, the famous finance minister of Akbar, the Great.

The Dharmasastras deal with the religious and moral law, the duties of castes and kings, as well as civil and criminal law. Manu *Smriti*'s assertion [II. 6. 12] that *Smriti*, *Smriti*, customs of virtuous men and one's own conscience (self-approval) with their widely differing sanctions, are the four sources of sacred law, is sufficient to show the mixture of law, with religion and morality. The special feature of the archaic Hindu society was the blending of law with religion without there being a clear line of demarcation between the two. Everything passed under the garb of religion and this was very profitable for enforcing implicit

(a) Gaut. XI. 19-24; Manu VIII. 1-3; Yajñ. I. 360; II. 1; Mit. Setlur's Edn. 218, 226-29.

(b) Manu VIII. 9-10; Yajñ. II. 1, 3; Nar

III. 4, 15, 17; Brih. I. 2-3, 4, 24.

(c) Mayne's H. L. 10th Ed. p. 13 F. N. (s).

(d) See Book I. Ch. VII of this work.

obedience and silencing all dissent. The religious element has, however, been much exaggerated in the Hindu system. In early times, rules of inheritance had close connection with rules relating to the offering of funeral oblations. Vishnu [XV 40] says "*Pinda follows the family name and the estate.*" The Smritis mention the son, grandson and great-grandson as the nearest in blood who have the right to inherit; so the doctrine of spiritual benefit is of no avail in these cases. The duty to offer *pindas* must, therefore, have been laid in olden days on those who, according to custom, were entitled to inherit the property. This doctrine of religious efficacy must have played its part when the duty to offer the *pinda*, a religious duty, and the right to take the estate were not vested in the same person, and in that case the duty to offer *pinda* was confused or mixed up with the right to offer it and to take the estate. In whatever way it is considered, it appears an artificial method of arriving at propinquity. Dr. Jolly [T. L. L. 168] rightly remarked: the theory that a spiritual bargain regarding the customary oblations to the deceased by the taker of the inheritance is the real basis of the whole Hindu Law of Inheritance, is a mistake. Even in the Bengal school where practical rules of succession were derived from this doctrine, it was availed of to bring in more cognates and to redress the inequalities of inheritance and to impress upon the people the duty of offering *pindas*. "When the religious law and the civil law marched side by side, the doctrine of spiritual benefit was a living principle and the Dharmasastris could co-ordinate the civil right and the religious obligation. But it is quite another thing, under present conditions, when there are no longer legal and social sanctions, for the enforcement of religious obligations, for courts to apply the theory of religious benefit to cases not expressly covered by the commentaries of the Dharmasastris. For, to apply the doctrine, when the religious duty is no longer enforceable, is to convert what was a living institution into a legal fiction. Vijnaneswara and those that followed him, by explaining that property is of secular origin and not the result of the Sastras and that right by birth is purely a matter of popular recognition, have helped to secularise Hindu Law enormously. Equally Vijnaneswara's revolutionary definition of sapinda relation as one connected by particles of body, irrespective of any connection with *pinda* offering, has powerfully helped in the same direction." (a)

SECTION 2. CODIFICATION, HOW FAR POSSIBLE AND DESIRABLE

There is no doubt that codification of law ensures a more intimate acquaintance of the rights and obligations among the individual members of society. It tends to increase and facilitate business relations and promises uniformity of jurisdiction which contributes to diminish litigation and thus adds to the security and stability of the civil rights of the members of the community. A well-framed code may focus the wisdom and acumen of the learned jurists upon identical points of construction and detailed development resulting in the better interpretation of law and the evolution of sounder principles and accurate conceptions of legal problems and their rational and effective method of treatment. But it is to be considered whether the same facts apply to the Hindus under the present circumstances and exigencies of time. The Hindus are well familiar with a code. Manu, our greatest law-giver, gave us a code which in spite of the ravages of time has a very high place amongst the standard codes of the world.

Nature of Hindu Law:

(1) Divine origin of Hindu Law:

(2) Highly elastic.

(3) Not exhaustive.

It is essential to consider the nature of the Hindu system of laws for this purpose. The Hindu system claims its emanation from the Supreme Ruler of the Universe, and the laws, given by Him, are His Commands. "Hindu Law is a body of rules intimately mixed up with religion and it was originally administered, for the most part, by private tribunals. The system was highly elastic and has been gradually growing by the assimilation of new usages and the modification of ancient text-law under the guise of interpretation, when its spontaneous growth was suddenly arrested by the administration of the country passing to the hands of the English, and a degree of rigidity was given to it which it never before possessed." (a)

The Hindu system of law is by no means exhaustive; rather it is a system upon which new customs and new propositions, not repugnant to the old law, may be engrafted from time to time according to circumstances and the progress of society. Manu [VIII. 41] says, "A king who knows the revealed law, must enquire into the particular laws of classes, the laws or usages of districts, the customs of traders, and the rules of certain families and establish their peculiar laws, if they be not repugnant to the law of God."

जातिजनपदान्धर्माञ्ज्येष्ठीधर्माश्च धर्मवित् ।

समीक्ष्य कुलधर्माश्च स्वधर्मं प्रतिपादयेत् ॥

(a) Sir Gooroodas Banerji p. 7, 3rd Ed.

Elasticity of the Hindu system of law is evident from the history of its growth and development which may be divided into three periods: (1) the *Srutis*, the *Vedas*, (2) *Smritis*—*Manu* and other *Rishi* commentators, and (3) commentaries like the *Mitakshara* and the *Dayabhaga*.

Lastly, it may be stressed that the Hindu Law is so intimately blended with religion that any attempt to change the former would be felt by the Hindus as a violation of the latter.

(4) Intimate fusion of law with religion.

Let us now consider the advantages and disadvantages of codification. The advantages are certainty, simplicity and uniformity of law; its sole disadvantage is artificial rigidity.

Desirability of codification.

The necessities of codification are :—

- (i) Cognoscibility of law ;
 - (ii) Removal of uncertainty of law ;
 - (iii) Checking the introduction of the technical rules of English Law—*Maxim of justice, equity and good conscience* ;
 - (iv) Avoiding the evils of judicial legislation ;
 - (v) Preserving the customs suited to the people of the country ;
- and
- (vi) Unifying influence of codes.

The following objections should also be considered :—

- (i) Inherent incompleteness of the code ;
- (ii) Its remedy—Revision ;
- (iii) Stereotyping of law by codification and judge-made-law ;
- (iv) Inapplicability to codification in general ; and
- (v) Alleged failure of existing codes.

The traditional policy of the British Government has been opposed to legislative interference with the native laws. Any such interference would be treated as an invasion of their religious rights by the Hindus.

Policy of the British Government.

The power of the Courts of British India to apply the Hindu Law to the Hindus is derived from and regulated by Statutes of Parliament and by imperial and provincial legislation. These enactments (a) are

Application of Hindu Law.

(a) A Civil Court has no jurisdiction to try caste questions, unless the suit is in respect of a right to property or to an office, see sec. 9 of the Civil Procedure Code and Bombay Regulation II of 1827, sec. 21.

given below :—

COURTS.	ENACTMENTS	EXTENT
1. The High Courts of Calcutta, Madras and Bombay in the exercise of their original civil jurisdiction.	The Government of India Act 1915, S. 112 [5 and 6 Geo. 5, c. 61]. See S. 223 of the Government of India Act, 1935 [26 Geo. v. c. 2].	"Matters of inheritance and succession to lands, rents and goods, and matters of contract and dealing between party and party (a)."
2. Presidency Small Causes Courts.	The Presidency Small Causes Courts Act, 1882, s. 16.	"The law to be administered by the Presidency Small Causes Court in each Presidency is the same as that administered by the High Court of that Presidency in the exercise of its ordinary original civil jurisdiction."
3. Bengal, United Provinces and Assam Provincial Civil Courts.	The Bengal, Agra and Assam Civil Courts Act, 1887, s. 37.	"Succession, inheritance, caste or any religious usage or institution."
4. Bombay Provincial Civil Courts.	Bombay Regulation IV of 1827, s. 26.	This Regulation does not specify any particular extent.
5. Madras Provincial Civil Courts.	The Madras Civil Courts Act, 1873, s. 16.	"Succession, inheritance, marriage, caste or any religious usage or institution."
6. Civil Courts in the Punjab.	The Punjab Laws Act, 1872, s. 5.	"Succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, female relations, wills, legacies, gifts, partitions, or any religious usage or institution."
7. The Civil Courts in Oudh.	The Oudh Laws Act, 1878, s. 3.	Ditto.
8. Civil Courts in Ajmere and Merwara.	The Ajmere Courts Regulation, 1877, s. 4.	Ditto.
9. Civil Courts in Central Provinces.	The Central Provinces Laws Act, 1875, s. 5.	As in the Punjab Laws Act, except that "divorce" is not included.
10. Civil Courts in Burma.	The Burma Laws Act, 1898, s. 13.	"Succession, inheritance, marriage, or any religious usage or institution."

(a) The High Courts of Calcutta, Madras and Bombay have dealt with questions relating to marriage and religious institutions according to Hindu Law though there is no specific reference to marriage or to religious institutions in the enactment. In re : *Kahandas Narandas* (1881) 5 Bom. 154, 167-70.

This enactment alone refers to the Hindu Law of Contracts so these laws and usages are still in operation where the Indian Contract Act is silent ; *Russick v. Lokenath* 5 Cal. 688.

Three conditions necessary for codification.

The following three conditions are essential before the cause for the codification of personal laws can be taken up:—

Firstly—There should be a complete *lex loci* of family relations and family property. At present we have the Indian Succession Act, the Special Marriage Act, the Majority Act, the Guardians and Wards Act, *etc.* This list should be completed by enacting laws for the other branches of the subject.

Secondly—There should be facilities for change of personal laws without change of creed

Thirdly—There should be the collective assent to each special code of the class affected and it should be elicited by means of suitable representative machinery.

The machinery for such codification—a standing commission—is essential to ascertain :

- (i) Rules of Hindu Law in force ;
- (ii) Growth of practices not in strict conformity with existing law ;
- and
- (iii) differences of opinion between different sub-divisions of Hindu Law, and attempts to reconcile them .

One of the most important characteristics of Hindu Law is that

Materials for such codification. it is rooted in communistic and family relations and is based on *status*, unlike the English Law which is individualistic and based on the inviolability of contract (a). The noticeable phenomenon in the legal world in British India is that the communistic and family relations are giving way to contract, and the Hindu Gains of Learning Act of 1930 is its recent example. The process of substitution is going on under the influence of the varying circumstances of this country. The chief difficulty which the British Indian legislators have to face lies in the fact that changes in law generally mean the substitution of individualistic for communistic principles (a). The process of

(1) Ancient Hindu Codes and commentaries.

substitution cannot be completed in a short space of time and the codification of Hindu Law should be based on ancient codes and their commentaries. But the provisions of these codes and commentaries cannot be used in their entirety because some of their texts have not been interpreted correctly by the British Indian Courts and are not in harmony with the sentiments of the people or written texts of the law.

(2) Case law.

Under the circumstances these decisions should be carefully considered, the correct ones are to

(a) Codification in British India by B. K. Acharya, p. 369,

be embodied in the future code while others are to be set aside. Then again the changes, when necessary, are to be made on the principles of justice, equity and good conscience. In deciding cases according to the principle of justice, equity and good

(3) Justice, equity and good conscience.

conscience, the judges often introduced many principles of English Law and engrafted them on the Hindu Law. Besides these three main principles as bases for codifying Hindu Law, the following works have rendered the task much easier, such as, Tagore Law Lectures on Minors, Hindu Law of Marriage and Stridhana, Law of Inheritance, Law relating to Hindu Widows, Law relating to Joint Hindu Family, Hindu Law of Adoption. Shyama Charan Sarkar's Vyavastha Darpan and Vyavastha Chandrika, Prof. Shastri's Viramitrodaya and other learned treatises, such as of Dr. Sir H. S. Gour, Sir D. F. Mulla, Golapchandia Sarkar Sastri, N. R. Raghuvendra Charya, Mayne's Hindu Law and Usage, *etc.*

Now we have not only the authoritative Sanskrit treatises translated into English but a good many others dealing very exhaustively with the subject. There are also eminent jurists both on the bench and in the bar who may form a committee to ascertain the correct law and usage prevailing in different parts of India. To a very great extent, administrative requirements can be satisfactorily met with if Hindu Law is codified.

Advantages of codification.

Digests prepared for these materials may be presented for eliciting public opinion and criticism. Once people begin to appreciate the advantages of these digests and are convinced that the process is meant to harmonize and to present the true state of law, the distrust will be removed and the difficulties of legislators will disappear. Such codification will not directly involve questions of social reform but will simply present in a short compass the law which is now to be gathered from old texts, commentaries and a huge mass of case-law. The

Methods of legislation :

(1) Original legislation.

(2) Remedial legislation.

(3) Establishment of harmony between judicial decisions and popular sentiments.

legislators will have to adopt the three following methods of legislation on this subject. The *first* method may be called 'original legislation', *i. e.*, legislation for setting right certain principles of Hindu Law regarding inheritance, *etc.*, as for instance, the case of inheritance by sisters and their issues. The *second* method will be 'remedial legislation' such as for religious endowments. The *third* method will be with reference to cases by the highest tribunals where the decisions are not in harmony with the sentiments of the people or written texts.

**Classification
of Hindu Law
for codification.**

The treatment of Hindu Law may be classified under the following main heads:—

- I. **Local and Personal Application** of the Code.
- II. **Family Relations**, *e.g.*, Inheritance to Males, Marriage, Adoption, Minority and Guardianship, Maintenance and Reversioners and their rights.
- III. **Joint Family System**, *e.g.*, Joint Family Property, Partition, Reunion.
- IV. **Family Property**, *e.g.*, Debts, Benami Transactions, Impartible Estates, Alienations, Gifts, Wills, and Religious and Charitable Endowments.

V. **Hindu Females**, *e.g.*, Stridhanam, Inheritance to females, Widow's Estate and Hindu Women's Rights to Property.

The above classification is based on the assumption that every law is a command of the sovereign. This idea cannot be associated with the idea of law according to Hindu Jurisprudence. The present theory of legislation in this country is not a theory of Hindu Law but of Western Jurisprudence. The change of theory is responsible for a good many difficulties which come across the way of the Anglo-Indian legislators and Administrators. The question thus arises

Theory of legislation in ancient Hindu jurisprudence. whether the theory of legislation according to ancient Hindu Jurisprudence can remove those difficulties, and if it can, what necessary changes in this theory should be made to adapt it to the present circumstances (a).

Development of Hindu Law.

According to Hindu Jurisprudence, laws are regarded as commands, not of any political sovereign, but of the Supreme Ruler of the Universe. While, on the one hand, the belief in the emanation of Hindu Law from the Deity, 'made it in theory absolutely unalterable by any temporal power, on the other hand, the very absence of temporal sanction in the majority of cases, and the feebleness of its connection with temporal authority, rendered it practically a system most readily adaptable to the varying wants of society.' Sir Gooroodas Banerjee (b) says, "The changes which have taken place in the course of time, both in the internal structure and the external surroundings of Hindu Society, must have continually presented motives for deviating from the rules laid down in the primeval code—motives which could be but insufficiently counteracted by the spiritual sanctions by which most of those rules were enforced. This led to innovation; and what was excused as necessary or desirable innovation in order

(a) B. K. Acharya—Codification in British India p. 223.

(b) The Hindu Law of Marriage and Stridhana 3rd Ed. p. 5.

generation, came to be revered as custom in the next. This has been brought about slowly, but steadily. Those numerous and important changes in the Hindu Law, may be seen at a glance by comparing the prevailing practices of the Hindus with those enjoined or reprobated in the Institutes of *Manu* or any other ancient sage..... To this mode of development of the Hindu Law by the displacement of old and obsolete rules by growing usages, the interpretation of texts by commentators has served as an important auxiliary. Each commentator, under the guise of interpretation, often moulded the ancient texts according to his own views of justice or expediency. And as the authority of each commentator was received in some places, and rejected in others, there arose what have been styled the different schools of Hindu Law." *Manu* [XII 108, 109] himself, to render Hindu Law most readily adaptable to the varying wants of society, provided "if it be asked how it should be with respect to points of the law which have not been specifically mentioned, the answer is that which Brahmins who are *sishtas*, propound shall doubtless have legal (force). Those Brahmins must be considered as *sishtas* who in accordance with the sacred law have studied the Vedas together with its appendages and are able to adduce proofs perceptible by the senses from the revealed texts."

अनामनातेषु धर्मेषु कथं स्यादिति चेद्भवेत् ।

यं शिष्टा ब्राह्मणा ब्रूयुः धर्मः स्यादशङ्कितः ॥

धर्मेणाधिगतो यैस्तु वेदः सपरिवृंहणः ।

ते शिष्टा ब्राह्मणा ज्ञेयाः श्रुतिप्रत्यक्षहेतवः ॥

Whenever the *sishtas* sanctioned any change, such a change was at first looked upon as necessary or desirable innovation. The legal consciousness of the people tolerated, though it did not welcome such changes, because they were approved of by the *sishtas*. In course of time such changes came to be revered as customs. The *sishtas* had the authority to sanction any innovation which they approved.

The next question is whether there is any means of adapting this method of developing Hindu Law to the present circumstances and how it can be developed. It must be developed on the same lines (as much as possible) as in the past. The non-Hindu sovereign cannot be considered to be a bar to its development because of the policy of strict religious neutrality of the present Government. It is noteworthy that most of the commentators, *sishtas* and the learned professors at the different seats of learning whose works are now the

**Adaptation
of the method
to present
circumstances.**

governing authority, flourished in the Muslim period and were the means of influencing the legal consciousness of the community, and of changing and developing the rules of Hindu Law. The ancient University of Navadvipa, the ancient seat of learning in Bengal, wielded enormous influence over the people of Bengal and it was really the law-maker for that province. True, *Jimutavahana* reigned supreme in Bengal, but his commentators while teaching their students and writing their treatises, under the guise of interpretation, altered their Guru's texts according to their own views of justice or expediency and sometimes even added to his texts (a). The students trained there gave *Vyavastha* to the people when there was any conflict. Navadvipa Pandits gave the verdict as the highest authority on law.

The authorities of *Sishtas* were curtailed partly because of change in the theory of legislation and partly because of the change in the constitution of courts. Sir Henry Maine's observation that the Mohamedan Government was a tax-taking and not a law-making Government is true as regards the personal laws of the Hindus, but not with reference to all branches of Hindu Law. It is not true as regards Hindu Criminal Law and Law of Evidence as they were superseded by Muslim Criminal Law and Law of Evidence; and the Revenue Law was also modified.

"There is another objection to codification of personal laws of Hindus and that is the difficulty which arises from the constitution of Hindu society. In Hindu jurisprudence the family is the unit of society and in Western jurisprudence the individual is the unit. The present day movement is from *status* to *contract* and even the Hindu society is undergoing changes in this respect under the silent influence of social and political forces. The phenomenon of gradual disintegration of Hindu joint family system is noticeable in every direction, and the natural consequences of such a transition though not in the shape of social anarchy but in the shape of social discontent are engaging the attention of every well-wisher of the community. Communism is sure to give place to individualism, but this change is to take place slowly and cannot be imposed upon any community. In the primitive stages of society, communism had its uses, but with the advance of civilization they have diminished. The laws of joint family system and property are to be administered amongst the Hindus while the Hindu society is changing its very basis by becoming individualistic and ceasing to

Constitution of Hindu society unfavourable to codification of the personal laws of the Hindus.

(a) *Puran v. Gopal* 8 C. L. J. 538; *Prosanno v. Sarat* 36 Cal. 86, 114, S. C. 8 C. L. J. 200.

be communistic." The Gains of Learning Act and such enactments are the result of this change. The joint family system, though in the process of disintegration, will not disappear soon. The Hindu community, based as it is on family-system will, in course of time, be based on individuals. Individualistic legislation becomes inevitable and the result of its rejection will only cause social revolution and anarchy.

Taking into consideration all these facts for or against the codification of Hindu Law, the materials available therefor, the difficulties involved, and its advantages and disadvantages, it does not appear feasible and desirable that Hindu Law should be codified. This view is strengthened all the more when the different enactments modifying Hindu Law are taken into consideration.

SECTION 3 FICTIONS IN THE DEVELOPMENT OF HINDU LAW

In the Hindu system of law fictions have left a permanent impress upon it while in the Western system they were discarded after they had done their work and were superseded by legislation. This permanent character of Hindu fictions and their enduring effect in evolving law from its crude beginnings to meet the needs of the progressive nation, is due to the wonderful institution of our ancient sages who left behind them a rich heritage of wholesome fictions permanently engrafted upon the religion of the soil. The dexterity with which they have been framed and assimilated as a part of the religion accounts for their continuance as an integral part of the Hindu Law. The ardent belief of a Hindu in the eternity, infallibility and the omniscience of the Vedas, despite his training and education in the English school of thought, shows the extent of the control that fictions command over the national mentality of the Hindus. The derivative character of the Smritis and the fiction by which *Sistachara* (approved usage) is read into the lines of the Vedas go to show the accommodating nature of Hindu Law, as a result of fictions. That the Vedas are the only authority on matters of law, religion, morality and every other department of learning, and that the Smritis emanated from the Vedas are fictions that have been very stoutly kept up in the Hindu system. The fact, however, remains that the Vedas contain very little of 'law,' in the lawyer's sense of the term. Fictions are treated as real and permanent in the Hindu system and are living realities up to the present day.

It is a well-known principle that law is developed by the

Influence of fictions in the two systems.

instrumentality of three agencies, namely, legal fictions, equity and legislation, and they work in the historical order as given above. Let the influence of legal fictions be considered here. Singular lack of fictions in the limited signification of the term is wanting in the old Roman and English systems where the two branches of law relating to procedure and jurisdiction of courts are deeply affected. This is the contrasting feature as regards the influence of fictions on the Western system when compared with that of the Hindus. Hindu Law, like other systems of law has not recognized a fiction as a source of law.

Bentham defines a legal fiction thus : " A wilful falsehood having for its object the stealing of legislative power by and for hands which could not or durst not openly claim it—and but for the delusion thus produced could not exercise it."

Fiction defined.

Sir Henry Maine defines it more generally as signifying any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration—its letter remaining unchanged, its operation being modified

The reason for the employment of fictions by the jurists is to transform the law without fear of detection. The Hindus of the Vedic age could not think of deviating a jot from the spirit of the law of the Vedas but with the advance of political and social progress the archaic law of the Vedas came to be of little use in its practical application to the people of the Post-Vedic age. The adoption of this device did not injure the conservative spirit of the public. Law is thus brought in harmony with the society by the employment of fictions (a). It is the easiest solution for evolving a law suited to changed conditions while the law is in the process of formation (a). The present age has not yet been completely liberated from the fetters of fictions, which is evident from such legal phrases as, constructive possession, constructive fraud, constructive Res Judicata, etc.

Cause for the employment of fictions.

Instances of the modification or expansion of law by means of legal fictions may be drawn from the history of the early law of property. In all archaic societies, inalienability of property was the rule, and alienation represented the exception. In Roman Law the distinction between Res Mancipi, and Res Nec Mancipi illustrates the point. A survey of the history of the right of alienation in this system from the earliest times when certain select classes of property could alone be alienated

Law of property a creature of fictions.

(a) Fictions in the Development of the Hindu Law Texts by O. Sankararma Sastri p. 112.

and those too by the adaption of certain prescribed fictitious proceedings, to the highly developed stage at which most classes of property passed by mere *tradition* or delivery will, when compared with the Hindu Law of Property, present a striking contrast between the different lines on which the Hindu and Roman Laws have proceeded through the different stages in the progress of the right of alienation. In the Roman system, the first inroad upon the inalienability of property was made in favour of sale or alienation for consideration, and the other transfers such as gift, exchange, *etc.*, were modelled as a later innovation derived from the law of sale by keeping up the fiction of a sale even in voluntary transfers. On the other hand, the Hindu Law starts from a free and voluntary gift, and the later laws of sale, exchange, *etc.*, were carved out of the law of gifts. Both the systems urge the observance of the requisite formalities prescribed by the ancient law. Corresponding to the difference between *Res Mancipi* and *Res Nec Mancipi* of Roman Law, a distinction between two sets of properties is to be met with in Hindu Law. This is evident from the following texts cited in the *Mitakshara* (a):

Land and bipeds, although self-acquired can neither be given nor sold without convening all the sons. Those that are born, those that are unborn, and those that remain in the womb require the means of living. There is, therefore, neither a gift nor a sale.

स्थावरं द्विपदं चैव यद्यपि स्वयमर्जितम् ।

असंभूय सुतान् सर्वान् न दानं न च विक्रयः ॥

ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिताः ।

वृत्तिं च तेऽभिकांक्षन्ति न दानं न च विक्रयः ॥

So it is evident from these texts that the incidents of immovable property attached to certain other kinds of property as well, and that both of them formed a separate class in respect of which even the father or the head of the family was denied the exercise of a free right of alienation, while in the case of movables a much greater right was recognised as is clear from the following texts (b):

"The father is the master of gems, pearls and corals, and of every thing (movable). But neither the father nor the grandfather is the master of the entire immovable property."

मणिमुक्ताप्रवालानां सर्वस्यैव पिता प्रभुः ।

स्थावरस्य तु सर्वस्य न पिता न पितामहः ॥

(a) *Mitakshara Vyavaharadhyaya Dayavibhaga Prakarana*, Introductory.

(b) *Ibid.* See Book I pp. 83, 84.

As regards the formalities the Mitakshara lays down (a); but the assent of townsmen, of agnates, of the king and of coparceners, and by the gift of gold and water—by these six means, land passes.

स्वग्रामज्ञातिसामन्तदायादानुमतेन च ।

हिरण्योदकदानेन षडभिर्गच्छति मेदिनी ॥

The consent of the villagers is required to give publicity to the transaction and not that the transaction is incomplete without the villager's consent. The assent of the sovereign is to avoid boundary dispute.

ग्रामानुमतिः व्यवहारप्रकाशनार्थमेवापेक्ष्यते ।

न पुनर्ग्रामानुमत्या विना व्यवहारसिद्धिः ।

सामन्तानुमतिस्तु सीमाविप्रतिपत्तिनिरासाय ॥

The meaning of the phrase 'By gift of gold and water';—since by the text 'of immovable property there is no sale, but one may hypothecate it with consent—of coparceners' a sale is prohibited of immovable property, and since, by the text 'He who accepts land, and he who gives it are both performers of a sacred act, and are bound to attain heaven' a gift is highly commended.' When a sale is to be effected of immovable property, one ought to do it in the form of a gift accompanied by the gift of gold and water (a):

हिरण्योदकदानेनेति ॥ स्थावरे विक्रयो नास्ति कुर्यादाधिमनुजया । इति स्थावरस्य विक्रय प्रतिषेधात्, भूमि यः प्रतिगृह्णाति यश्चभूमिं प्रयच्छति । उभौ तौ पुण्यकर्माणौ नियतौ स्वर्गगामिनौ ॥ इति दानप्रशंसादर्शनाच्च विक्रयेऽपि कर्तव्ये सहिरण्यमुदकं दत्त्वा दानरूपेण स्थावरविक्रयं कुर्यादित्यर्थः ॥

Thus there were three stages in the development of the right of alienation of immovable property, *viz.*, firstly a free and voluntary gift, secondly—a hypothecation in addition to gifts; thirdly—a sale or alienation for valuable consideration.

The influence of fictions in the Roman and the English systems was confined mostly to two departments of adjective law, *viz.*, the procedure in court, and the jurisdiction of courts. To consider the influence of fictions in Hindu Law, one must bear in mind the different significations of the term 'legal fiction.' In other foreign systems—the English and the Roman, it has a limited significance. The reason for the peculiar lack of fictions in the narrower sense in Hindu Law is twofold. "The primitive law of Rome was entirely a code of rules relating to forms of action, and the substantive rights and obligations

(a) *Ibid.* See Book I. pp. 83, 84.

had to be known only through the forms of action prescribed for the enforcement of rights and obligations. If a particular remedy was provided, a corresponding right or obligation was inferred, and it was through this inferential process that the highly complicated substantive law of later Rome was drawn out from early sources." (a) The case is quite different in Hindu Law, as is evident from Manu Smriti, which deals with adjective law in an unimportant portion of the eighth chapter and Yajnavalkya Smriti which deals with it under 'general procedure' and 'special procedure' in two small chapters at the beginning of Vyavaharadhyaya. It is not true to say about Hindu Law that its civil law is largely derived from rules relating to crimes. Sir Henry Maine

has set up quite different theories that procedure in all archaic law was disproportionately large and that civil law was derived from criminal law; they do not hold good in the Hindu system. "In most of the examples, transgressions of law entail not merely punishment of the offender, but a liability to pay substantial compensation to the injured party. Yajnavalkya refers to defamation, rape, adultery, breach of trust and some other offences most of which come under the meaning of *Sahasa*. But there is everywhere the preponderance of the idea of civil injury over that of a public wrong." (b)

There was no necessity of the evolution of Hindu Law from the meagre beginnings in the adjective law nor of any invention of fictions as there were several sets of courts having their defined jurisdictions. It may be admitted that there were no well-defined rules of jurisdiction as between the royal and the popular courts: and there was no rule prohibiting a court of superior jurisdiction to hear and decide a case capable of being heard and disposed of by a court of inferior jurisdiction. In Medieval England, the existence of well-defined rules as to the limits within which the King's Bench and the Common Law Court exercised their jurisdiction accounts for the abnormal growth of legal fictions. Therefore, it may be inferred that in Hindu Law there was no necessity for the invention of fictions in the strict sense of the term at any period of its history.

In the extended significance of Hindu Law, fictions are of two kinds—the fundamental fictions on which a number of other fictions are founded, and the derived fictions.

Classification of fictions.

The leading fundamental fictions on which the entire structure

(a) O. Sankaranna Sastri's *Fictions in the Development of Hindu Law Texts* pp. 34,

(b) *Ibid.* p. 35.

Omniscience of the Vedas. of Hindu theology and philosophy rests are *the theories of omniscience, infallibility and eternity of the Vedas*. As regards the theory of the Vedic omniscience the maxim is **अनन्ता वै वेदाः** 'Vedas are unlimited (a).' The primary assumption underlying this theory is that the subjects dealt with by the Vedas are unlimited or that they deal with theology, ethics, positive morality and philosophy, materialistic sciences as rhetoric or poëtic, music, warfare, engineering, architecture, in fact, all departments of learning, and the positive law or the body of rules regulating the dealings between man and man as far as can be enforced by a court of law. Another primary assumption as regards this theory of omniscience of the Vedas is that all the subjects as enumerated above exist in the Vedas in the same advanced stage as they are found at present. This twofold assumption underlying this theory has been brought out by the Mahabharata (b) **यन्नेहास्ति न कुत्रचित्**. 'What is not found here is nowhere else'

The Western scholars of Sanskrit are of the opinion that the entire Vedic literature bears traces of the composition of different ages and of different authors. But all the schools are absolutely unanimous as to the eternity of the Vedas and the differences are only technical. They all deny the human origin of the Vedas. "The Nyaya school holds the view that *Ishvara* is responsible for both the composition and the pronouncement of the Holy Scriptures; the Vedanta school accepts that God is not responsible for the composition, but for the mechanical reproduction at the beginning of the creation; while the Mimamsaka school maintains that God is responsible neither for the composition nor for the utterance; that the Vedas have been from eternity handed down from generation to generation, by man to man, by word of mouth, and no particular stage of time can be described as having witnessed the origin of the Vedas." (c) This idea has been expressed in the maxim **न कदाचिदनीदृशं जगत्** 'At no time was the world unlike what it is.' (d)

The Vedas are infallible. With regard to the theory of the infallibility of the Vedas, it may be said that the Vedas are exclusively religious codes but the Mimamsakas hold that the Vedas represent a homogeneous code of rules relating to law and ethics owing to the wide significance given therein to the word '*Dharma*'. Their fundamental conception of the Veda is that it

(a) Taittiriya Brahmana 3. 10, 11.

(b) Mahabharata : Adi Parva, Adhyayn 62, Sloka 26.

(c) C. Sankararama Sastri—Flourions p. 51.

(d) Gauda Brahmanandiya (Nirṇaya-sāgara Press Ed.) p. 170 and Bindu Tika

p. 11.

entirely and exclusively concerns itself with *Dharma* which has been defined in the second aphorism by Jaimini thus—चोदनात्मनोऽर्थो धर्मः "That which is signified by a command and leads to a benefit is called *Dharma*." This definition applies not only to rules of morality, ethics and religion but also to rules of positive law. There are slight differences as to the exact significance of the term *Dharma*. The Prabhakara school restricts its denotation to the act actually commanded by a Vedic Vidhi; the Nyaya school maintains that the word denotes the invisible effect named *Apurva* which attaches to the soul on the performance of a religious act and endures till the attainment of the benefit contemplated by the act; and the Bhatta school gives it a much wider meaning by holding that the act enjoined by a Vidhi and the material connected therewith do all come within the definition of *Dharma*. If *Dharma* is the only topic of the Veda which is conveyed by a Vidhi alone, how are the other passages which are not Vidhis or commands to be accounted for? This objection or difficulty is removed by considering the fourfold classification of the Vedas adopted by the Mimamsakas into *Vidhi*, including a *Pratisedha* or prohibition, *Mantra* or a hymn addressed to gods at a sacrifice, *Arthavada* or the passages of Vedas where a certain act commanded or prohibited by a Vidhi is praised or condemned, and lastly *Namadhya* or the nomenclature portions and their distinction. The Mimamsic principles of the distinction of the *Namadhya* portion of the Vedas from the rest (a) will show that the *Namadhya* portion of the Vedic literature has no authority by itself but depends upon its authority upon other texts of which *Namadhyas* are to be taken as part and parcel.

Mantra portion simply serves the purpose of recalling to mind the deities for whose propitiation the sacrifices enjoined by the Vidhi portion are performed. The Mantras have, therefore, no authority by themselves, but play a subservient part to the Vidhis in as much as they help the completion of acts enjoined by Vidhi texts (b).

Jaimini's theory is that the commanding portion of the Vedas is alone operative and that the function of *Arthavada* is to eulogise or condemn acts referred to in the Vidhis or *Nishedhas* respectively. The Mimamsakas have admitted that the Vidhis have been modified to some extent by *Arthavadas* but the strong theory of the Mimamsa is that a Vidhi cannot be modified in view of an *Arthavada* and this principle has been clearly laid down in the doctrine of *Hetuvannigudadhikarana* (c).

(a) For fuller discussion See Book II Mimamsa Rules of Interpretation pp. 163, 169-170. (b) C. Sankararama—Fictions p. 59. (c) For detailed discussion see Book II, Ch. V, Sec. 1, p. 159.

There is a singular lack of rules relating to positive law in the Vedas, so they cannot be treated as an original source of law except by a legal fiction. This fiction has been so adhered to that Smṛiti is supposed to be derived from Śruti though there are no texts in the Vedas, in support of the assumption. The fact is that the Smṛitis would have lost their purpose if corresponding rules in the Śrutis had been found, yet the theory is maintained.

श्रुतिं पश्यन्ति मुनयः स्मरन्ति च तथा स्मृतिम् ॥

The two terms *Śruti* and *Smṛiti* themselves give support to this theory. Some of the theories in support of the emanation of Smṛitis from Śruti are now mentioned. The theory of the lost Śruti or *Utsannavada* lays down that the Vedic texts that were the foundation of Smṛiti texts were actually available to the Smṛitikars but have since become extinct owing to desuetude. The Mimamsakas have rejected this theory as it militates against the doctrine of the eternity of the Vedas. Another theory which is farther from truth but nearer technical accuracy is that of the 'Hidden Śruti' known as *Prachīnavada*. This theory lays down that the Vedic text on which a Smṛiti is founded, is eternally hidden in the Veda, and its existence is to be known for ever by inference or that the inferential Śruti originating a Smṛiti is a postulate which is not disputed. Kumārila Bhaṭṭa struck a *via media* by adopting a theory which is shortly termed as the *Pratipakṣavada* or the theory of the 'Patent Śruti' according to which the Śruti texts that were the basis of the Smṛitis are deemed to be available in the extant Vedic literature itself and that every bit of Smṛiti has a corresponding Śruti in original.

**Part played
by fictions in:**

A few instances of the different branches of law as developed by fictions are given below :

The law of adoption is one of the most important branches of Hindu Jurisprudence that owes its existence to the influence exerted by legal fictions. The laws of joint family, partition, inheritance, *etc.*, underwent a process of evolution. The theory of a substitute or *Pratinidhi* lays down precise rules about the character of a substitute and the extent to which the attributes of the original may be extended to the substitute.

A good deal of Hindu Law has been evolved by this principle. The peculiar body of rules relating to the fiction of adoption are due to this very principle. Maṇu (IX. 180) says : ' Wise men declare these eleven sons beginning with *kṣhetraja*, the substitutes of a son, to prevent a failure of the funeral obsequies.'

क्षेत्रजादीन् सुतानेतानेकादश यथोदितान् ।

पुत्रप्रतिनिधीनाहुः क्रियालोपान्मनीषिणः ॥

When there is no real son, a fictitious son is recognised, as he is a substitute for a legitimate son; an adopted son is generally invested by law with the status of a natural born son. By legal fiction an adopted son acquires a similar right as a legitimate son acquires an interest by birth in the joint family property and he can also demand a partition of ancestral property in the hands of his father like an *aurasa*. The validity of a pre-adoption alienation made by his adoptive mother can be challenged by an adopted son like a posthumous natural born son.

The evolution of a woman's rights of inheritance is also an outcome of the influence of a legal fiction. Like
2. Rights of women. all other systems of law, women were never assigned in the Vedic primitive law any share in any property. The term family consisted of males entirely and females had no legal entity or any status. This state of society is generally known as the patriarchal stage, where women had no rights either of inheritance or of maintenance or of custody. This state of society is cited in the text of Baudhayana निरिन्द्रिया ह्यदायादाश्च स्त्रियः (a) 'Women are devoid of senses, and they are no participators (in property).'

Different limitations were put upon the scope of this rigid rule at different periods in the history of the development of Hindu Law. The legal fiction of the identity of husband and wife was the chief instrument which overthrew the rigidity of this rule. The same is true of the English system also. The following passage of Vajasaneya Brahmana evidences this fiction : " A man is only a half of his self. Therefore, when he takes not a wife he is not fully born, for he is incomplete so long. Then when alone he takes a wife, he is fully born, and he becomes complete. Accordingly Brahmins versed in Vedas declare this, ' the person known as husband is verily known as the [wife.' "

अर्धो ह वा एष आत्मनः तस्माद्यज्ञायां न विन्दते नैतावत्प्रजायते । असर्वो हि तावद्भवति अथ यथैव जायां विन्दते । अथ प्रजायते तर्हि सर्वो भवति । तथा चैतद्वेदविदो विप्रा वदन्ति । यो भर्ता सैव भार्या स्मृता ।

The same idea is expressed by Manu (IX. 45) thus : " What is known as a wife, self and offspring, a man consists of the same. In

(a) Baudhayana Dharma Sutra 2, 2, 47; vide also Taittiriya Samhita 6, 6, 8.

accordance therewith Brahmins declare this : He that is the husband is known as the wife."

पतावानेव पुरुषो यज्ञायात्मा प्रजेति ह ।

विप्राः प्राहुस्तथा चैतद्यो भर्ता सा स्मृताङ्गना ॥

Bṛihaspati's (a) notion of the fictitious identity between a husband and a wife is more expressive : "In the sacred law, the Smṛiti Code, and popular usage, a wife is recognised by wise men as half the body and an equal participator in good and bad fruits. Of him whose wife does not cease to live, half the body continues to live. When half the body lives, how can anybody else take the wealth (of a deceased)? While agnates are living including the father, brother and cousins, of a sonless deceased man, the widow takes the share."

आज्ञाये स्मृतितन्त्रे च, लोकाचारे च सुरिमिः ।

शरीरार्धं स्मृता भार्या, पुण्यापुण्यफले समा ॥

यस्य नोपरता भार्या, देहार्धं तस्य जीवति ।

जीवत्यर्धशरीरेऽर्थं कथमन्यः समाप्नुयात् ॥

सकुल्यैर्विद्यमानैस्तु, पितृभ्रातृसनाभिभिः ।

असुतस्य प्रमीतस्य, पत्नी तद्भागहारिणी ॥

The order in which the above texts have been given, shows the development of a widow's right to inherit under the Hindu Law. Under the modern Hindu Law the next heir to a sonless man in default of the widow is his daughter. In the Smṛiti as well, there has been an improvement upon the primitive law as represented by Apastamba's text that describes women as incapable of owning property. The Smṛitis recognised five female heirs, daughter being one of them. The gradual growth of the right of the daughter to inherit was the result of the deviation from the original rule made in favour of the widow by means of the fiction of legal identity. Once an exception was made to the general rule, further inroads in the same direction were subsequently made in favour of other female relations. The influence of the introduction of the widow into the list of heirs coupled with a fiction of identity between the father and his issues, male or female, accounts for the high rank that a daughter enjoys among the list of heirs under the Smṛiti law. Manu (IX. 130) says about the identity between a father and a daughter : "As is the self, so is the son, and a daughter is equal to a son. When the self stands in her form, how shall any one else take away the estate?"

यथैवात्मा तथा पुत्रः पुत्रेण दुहिता समा ।
तस्यामात्मनि तिष्ठन्त्यां कथमन्यो धनं हरेत् ॥

The fiction of single personality of a husband and a wife is not the only one known to the Hindu Law but there are several others of the same kind such as the affinity between master and slave, father and son, preceptor and disciple. The early law of property has been much impressed by this fiction, as a text of Manu (VIII 416) refers to a very primitive state of society when the son, the wife, the slave and the disciple had no independent legal recognition and were deemed as absolutely incapable to hold property in their own right : "A wife, a son and a slave—these three are deemed to have no property. What they earn is the property of him to whom they belong."

भार्या पुत्रश्च दासश्च त्रयं पवाधनाः स्मृताः ।
यत्ते समधिगच्छन्ति यस्यैते तस्य तद्धनम् ॥

The fiction of identity between master and slave accounts for the special rules of inheritance for the succession of a Dasiputra. The text (a) regarding Dasiputra was originally intended to regulate the rights of inheritance of a son begotten on a female slave; the principle was extended to a son born of a permanently kept concubine, on the abolition of slavery : "A son born of a Dasi by a Sudra shall take a share at the desire (of his father). On the death of the father, the brothers ought to make him a sharer of a half."

जातोऽपि दास्यां शूद्रेण कामतौऽशहरो भवेत् ।
मृते पितरि कुर्युस्तं भ्रातरस्त्वर्धभागिकम् ॥

There is another similar text (b) on the point : "Of a person retired to the forest, an ascetic and a bachelor, the sharers of the heritage are, in an inverse order, the preceptor, a good disciple, and a brother of the same *Ashrama*."

वानप्रस्थयतिब्रह्मचारिणां रिष्यभागिनः ।
क्रमेणाचार्यतच्छिष्यधर्मभ्रात्रेऽक्तोऽर्थिनः ॥

This rule of inheritance is the result of the fiction of identity between a preceptor and a disciple.

The law of property remained for long under the full sway of

4. The Law of property.

these fictions of identity, but numerous branches of law remained unaffected by their influence. There are some rules in the Smritis which even go to negative the reality of these identities. The consideration of the limitations to the fiction of identity will show the branches of law which escaped its influence. The following texts illustrate the point :

I Yajnavalkya (a) says "The husband need not return to the wife her peculium received during adversity, for the performance of obligatory ceremonies during illness and under pressure of impending confinement "

दुर्मिते धर्मकार्ये च व्याधौ संप्रतिरोधके ।

गृहीतं स्त्रीधनं भर्ता न स्त्रियै दातुमर्हति ॥

This text implies that wealth received from the wife in other cases ought to be returned by the husband. This rule contravenes the fiction of identity between a husband and a wife.

II. Another similar text of Yajnavalkya (b) is "For in the land that is acquired by a paternal grandfather, in the property yielding a recurring income and in the chattel (acquired by the paternal grandfather) there shall be equal ownership of father and son."

भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा ।

तत्र स्यात्सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि ॥

This text clearly militates against the fiction of the merger of the son's personality in that of the father.

III. Narada's text: "Of these, he that saves his master from danger to life shall be freed from slavery, and he shall get a son's share,"

यश्चैषां स्वामिनं कश्चिन्मोचयेत्प्राणसंशयात् ।

दासत्वात्स विमुच्येत पुत्रभागं लभेत च ॥

shows the extent of limitations placed upon the fiction of identity between a slave and his master.

IV. Gautama (Dharma Sutra Adhyaya 2 Sutras 49, 50, 51) says "The correction of a disciple shall be without the infliction of corporal punishment. In the case of inability, chastisement may be by means of a slender rope or bamboo twig. If he beats with any other (material), he shall be punished by the king."

शिष्यशिष्टिरवधेन । अशनौ रज्जुवेणुविदलाभ्यां तनुभ्याम् । अन्येन घ्नन्
राज्ञा शास्यः ॥

The recognition of the validity of legal proceedings between preceptor and disciple in the above text contravenes the fiction of this identity.

The fiction, *a child in the womb is equal to a child in existence*—has also played an important part in the evolution of law. The consequence of its recognition is that for legal purposes computation of age is ordinarily to be made from the date of conception and not of birth, as Gautama says गर्भादिः संख्या वर्षाणाम् (a) 'The calculation of years begins from conception.'

This fiction is material for the purposes of initiation ceremony or the date of majority. As regards the former, a Brahmin is to perform it in the eighth year and the optional dates are the ninth and fifth years; the ages for a Kshatriya and a Vaisya are eleven and twelve respectively: "The latest ages for initiation in these cases of the three regenerate classes are the sixteenth, twenty-second and twenty-fourth years. In these cases the calculation is to be made from the date of conception."

उपनयनं ब्राह्मणस्याष्टमे नवमे द्वादशमे वा काम्यम् । एकादशद्वादशयोः क्षत्रियवैश्ययोः । आषोडशात् ब्राह्मणस्य सावित्री । द्वाविंशते राज्ञ्यस्य । द्वायधिकाया वैश्यस्य । (b)

In calculating the age of majority the starting point is the date of conception. Narada says "A child until the eighth year is known to be similar to those in the womb; until the sixteenth year he is called a boy and a minor."

गर्भस्थैः सद्गुणो ह्येयः आष्टमाद्वत्सराच्छिशुः ।

बाल आषोडशाद्वर्षात्पौगण्डश्चेति शब्देन ॥

The difference between the Dayabhaga and other schools as to the attainment of majority at the beginning or the close of the sixteenth year is due to the rigidity or the looseness of this fiction.

The law relating to alienation of joint family property has also been much influenced by this fiction. The principle of the Mitakshara school that the existence of a son will be an impediment to the free right of alienation on the part of a father or manager of a family has been extended to a son conceived but not yet born.

6. Law of alienation.

ये ज्ञाता येऽप्यज्ञाताश्च ये च गर्भे व्यवस्थिताः ।

वृत्तिं च तेऽभिकाङ्क्षन्ति न दानं न च विक्रयः ॥

(a) Gautama Dharmī Sūtra I. 9.

(b) *Ibid.* Adhyaya I, Sūtras 7, 8, and 11—16.

"They that are born, they that are unborn, and they that remain in the womb require a means of living. Therefore, there is no gift nor sale." (a) This prohibition relates to real property.

The law of partition has also been touched by this fiction.

Yajñavalkya (b) says: **दृश्याद्वा तद्विभागः स्यादायव्यविशोधितात्** "A partition shall be effected of the residue on taking to account the incomes and the outgoings." The Mitakshara lays down rules for the reopening of the partition when a coparcener's wife delivers a male child and the partition should be effected after delivery when the pregnancy is apparent.

एतच्च विभागसमयेऽप्रजस्य भ्रातुः भार्यायां अस्पष्टगर्भायां विभागादूर्ध्व उत्पन्नस्यापि वेदितव्यम् । स्पष्टगर्भायां तु प्रसवं प्रतीक्ष्य विभागः कर्तव्यः । (c)

One exception to this fiction exists relating to a person's capacity to adopt a son. The rule of Atri (d) is "Only by a sonless man shall always a substitute for a son be taken." **अपुत्रेणैव कर्तव्यः पुत्रप्रतिनिधिः सदा ।** The word 'sonless' has not been construed to exclude a person whose male child has been conceived and it has been explained to be **अजातपुत्र** and **मृतपुत्र**, one to whom no son is born, and one whose sole surviving son is dead.

The fiction that an idol is possessed of a *juristic personality* and that the head of a Mutt is a *corporation sole* and a person in the eye of the law, has influenced the law regarding religious endowments immensely in contrast with the law of primitive society where gifts and bequests to individuals were much more common than donations in favour of institutions.

8. Conception of juristic person.

The fiction of an heir's spiritual efficacy to offer funeral oblations to the person to whom succession is to be determined has also played an important part in developing a major portion of the law of inheritance.

9. Spiritual efficacy.

The textual exception to the rule of escheat that in default of the next of kin, the estate of a Brahmin goes to learned Brahmins and not to the king is attributable to the semi-divine character of a Sovereign which is presumed to depend upon his keeping good relations with the Brahmin hierarchy.

(a) Mitakshara Vyavaharadhyaya Daya- | (c) Mitakshara Vyavaharadhyaya, Sloka vibhagaprakarana, Introductory. 122.

(b) Yajñavalkya Vyavaharadhyaya, 122. (d) Atri Smṛiti Sloka, 52.

The fiction of the duration of human memory has been used in the Hindu Law to distinguish an ancient custom from a modern one. A distinction is made between *Smarta Kala* and *Asmarta Kala* or the period within memory and the period beyond memory, regarding a particular custom whether or not it prevailed for at least a hundred years back from the date of dispute. As regards possession as evidence of title, where the proof of title is vague or undisclosed, possession for more than hundred years has been held to be conclusive proof of ownership. Yajnavalkya (II, 27) while dealing with the comparative weight of possession and the lawfully recognised modes of acquisition of title, says: "Title is superior to possession, unless the latter has devolved in order from ancestors."

आगमोऽभ्यधिको भोगादिना पूर्वकमागतात् ।

Mitakshara (a) has deduced this rule from this text: "In the period within memory title is superior to possession, but beyond that possession is paramount."

विना पूर्वकमागतादित्येतच्चास्मार्तकालविषयम् ।

आगमोऽभ्यधिको भागादिति च स्मार्तकालविषयम् ॥

In laying the duration of legal memory, Mitakshara (a) says: "The duration of memory ranges up to a hundred years, for the scripture says, a man's age-limit is a hundred years "

स्मार्तश्च कालो वर्षशतपर्यन्तः शतायुर्वै पुरुष इति श्रुतेः ।

In consequence of the influence of this fiction upon the interpretation of the original text of Yajnavalkya, the law has been laid down thus by Katyayana (b) :

स्मार्तकाले क्रिया भूमेः सागमा भुक्तिरिष्यते ।

अस्मार्तेऽनुभवाभावात् क्रमात्त्रिपुरुषागता ॥

SECTION 4. PRIMARY ASSUMPTIONS IN HINDU LAW

It is generally known that widows or limited heirs can alienate property for legal necessity. But if such necessity is not proved, the *consent* of such reversioners as may fairly be expected to be interested to dispute the transaction, will be held to *uphold the presumption that necessity existed*, which if not rebutted by contrary proof,

Widow's alienation : when presumption of legal necessity arises,

(a) Mitakshara Vyavaharadhyaya under Sloka 27,

(b) Mitakshara Vyavaharadhyaya Sloka 27,

will validate the transaction, as a right and proper one (a). But the presumption may be rebutted by the reversioner by showing that the consent was given, not with true knowledge of the circumstances, and of the effects of the transaction, or with an intelligent intention to consent to such effect; or by actual reversioner at the widow's death by showing that there was no legal necessity for the alienation.

Where property has been acquired in business by persons constituting a joint Hindu family by their joint labour, but without the aid of joint family property the presumption is that it is the joint property of the joint acquirers. But this presumption may be rebutted by showing that the persons constituting the joint family acquired the property not as members of joint family but as members of an ordinary trade partnership resting on contract, in which case the property will be deemed to be partnership property (b).

If the property be presumed to be joint property, the question is whether it should also be presumed to be joint family property. In *Laldas v. Moribai* (c), the Bombay High Court held that property acquired in business by persons constituting joint Hindu family by their joint labour without the aid of joint fund may not only be presumed to be joint property of the acquirers, but must be presumed to be joint family property.

But the Madras High Court held in *Sudarsanam v. Narasimbalu* (d) that the presumption that it is joint family property may be rebutted by showing that the acquirers intended to hold the property as co-owners between themselves in which case it would be their joint property.

Where the question arises as to whether the marriage was in an approved or unapproved form, the presumption is that it was in the approved form, when the parties are Sudras. But this presumption may be rebutted by proof that it was in an unapproved form, showing that the consideration passed from the bride-groom to the father or the guardian of the bride (e).

Where it is proved that marriage was performed in fact, the court will presume that it is valid in law and that the necessary ceremonies have been performed. But it was held in *Chellamal v. Ranganatham* (f) that this presumption may be rebutted by proof of facts that no marriage ever took place.

(a) *Rangaswamy v. Nachiappa* 46 I. A. 73, | (d) 25 Mad. 149.

42 Mad. 523, 50 I. C. 498, 1918 P. C. 196. |

(b) *Ganpat v. Annaji* 23 Bom. 144. |

(c) 10 Bom. L. R. 175, |

(e) *Jaganmath v. Narayan* 34 Bom. 553.

(f) 34 Mad. 277, 12 I. C. 247; 40 Bom. 369; 32 I. C. 986; 1916 Bom. 283.

Where a Hindu family migrates from one province to another, the presumption is that it carries with it its personal law, that is, the laws and customs as to succession and family relation prevailing in the province where it is domiciled (a), and those prevailing among its caste fellows in the locality (b).

But this presumption may be rebutted by showing that the family has adopted the law and usage of the province to which it has migrated (c).

SECTION 5. FACTUM VALET

The doctrine of *factum valet* which owes its origin to Roman jurisprudence, depends upon the principle of justice, equity and good conscience, which judges in India are bound to administer whenever the substantive rules of the local law provide no clear and unambiguous guide. This doctrine *quod fieri non debuit factum valet* (i. e. what should not be done, yet being done shall be valid) was laid down for the first time by Jimutavahana. By this is meant that "a thing performed by a man in virtue of a right, natural or legal, cannot be made otherwise on account of the fact that there are texts of Hindu Law prohibiting such thing. This passage of Dayabhaga [II, 30; Jolly T. L. I., 113] **वचनशतेनापि वस्तुनोऽन्यथाकरणशक्तेः** was translated by Colebrook into : "For a fact cannot be altered by a hundred texts." Some scholars took it as the peculiar doctrine of the Bengal school applied for the first time by Jimutavahana when he laid down that the power of the father to alienate the family property was absolute even in the presence of the sons. The incorrect translation caused this confusion and mistake. What Jimutavahana intended was that when a person did an act which in law he had a right to do, that act could not be set aside on the ground that there were a hundred texts prohibiting it. He supported it by saying that the ownership having been conferred upon the father by the texts, he had the right to alienate the property in spite of the text prohibiting alienation and that the latter text should be understood only as showing that it was undesirable on the part of the father to alienate the property to the prejudice of the sons. He started with the primary assumption that the father had the right to alienate.

This is a well-known maxim of civil law applied to remedy irregularities in form and defects in procedure not affecting the essential principle. Such texts as are referred to are merely directory and the questions involved in them are matters of formalities or ceremonies

(a) *Thaikandi v. Nilvatukul* 39 M. L. J. 427, 13 M. L. W. 101, 60 I. C. 209. See *Krishna v. Sadashchuran* 1938 Nag. 163,

(b) *Tula Ram v. Shyam* 49 All. 848.

(c) *Parbati v. Jagdish* 39 I. A. 82, 29 Cal. 433,

which do not affect the essence of the transaction. In no case should the application of this maxim exceed the limits recognised in the Roman Civil Law.

No doubt this doctrine was enunciated for the first time by the author of the Dayabhaga but it is recognised also by the Mitakshara school. It has been held by the Privy Council in the case of *Wooma Dass v. Gokoolanund* (a) and also in *Ganga Sahai v. Lekhraj* (b) that the doctrine is recognised by the Mitakshara school also.

The tests to distinguish between the rules of legal obligation and those that are merely preceptive are common in the two schools. According to the Mitakshara school, co-heirs are *joint tenants*, unlike the Dayabhaga which treats them as *tenants-in-common*. The principle is, therefore, declared that a co-heir cannot alienate his undivided coparcenary interest in joint property without the consent of his coparceners. By this difference it cannot be concluded that the doctrine of *factum valet* is not recognised by the Mitakshara school to the same extent as in the Dayabhaga.

The scope of this doctrine has been discussed thus by several High Courts. The Bombay High Court laid down, "In cases in which the Sastra is merely directory and not mandatory, or only indicates particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the precept or recommended preference be disregarded." (c) The Allahabad High Court observed: "In the case of adoption there are, of course, questions of formalities, ceremonies, preference in the matter of selection, and other points which amount to moral and religious suggestions. Such matters, speaking generally, are dealt with in the texts in a directory manner, relating to what I may perhaps call the *modus operandi* of adoption. To such matters, which do not affect the essence of the adoption, the doctrine of *factum valet* would undoubtedly apply upon general grounds of justice, equity and good conscience, and irrespective of the authority of any text in the Hindu Law itself." (a)

Hindu Law like other systems makes the province of legal obligation co-extensive with that of religious or moral obligation. A man may disregard the plainest dictates of duty and may be ungrateful, selfish, cruel, treacherous to those who reposed confidence in him and

(a) 3 Cal. 597, 5 I. A. 40.

(b) 9 All. 253, 292-96.

(c) *Laksmappa v. Ramaya* 12 Bom. H. C.

R. 364, 398. See also *Gopal v. Hanmant* 3 Bom. 273, 297; *Dharma v. Ramkrishna* 10 Bom. 80, 86.

(d) *Ganga v. Lekhraj* 9 All. 253, 296-97.

yet he may be within his legal rights. The Hindu sages foresaw this distinction; so the precepts they gave for the guidance of life may be construed in this light. The question arises as to what kind of condemnation is meant by the precept, a moral condemnation or a legal one. Their Lordships of the Privy Council remarked in *Sri Balusu v. Sri Balusu (a)*, "Their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of *factum valet*. That unhappily expressed maxim clearly causes trouble in Indian Courts. Sir M. Westropp is quite right in pointing out that if the *factum*, external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law."

The maxim is indeed one on the borderland between moral and positive law.

This maxim does not depend on any rule of Hindu Law and has been invoked in cases of adoption, marriage, alienation and maintenance of widows.

Application of the maxim.

Where there are questions of formalities, ceremonies, preference in matter of selection and other points which are dealt with by the texts in a directory manner, to such matters the doctrine of *factum valet* will apply undoubtedly upon general principles of equity, justice and good conscience and irrespective of any authority in the Hindu Law itself, the reason being that such matters do not affect the essence of the adoption but they relate only to the *modus operandi* of adoption. The texts relating to (1) the adoption of an only son, (2) the adoption of a boy without the ceremony of *datta homam*, (3) the adoption of a married sagotra, and (4) the adoption of a stranger in preference to a person's brother's son, are merely directory.

No adoption may be set aside for a mere irregularity or for non-observance of a form not essential to its validity. In particular and without prejudice to the generality of the foregoing rule, it may not be set aside on any of the following grounds, namely:—

(1) that the adopted son was the eldest, the youngest or the only son of his father;

(a) 26 I. A. 113, 149, 21 All. 460, 487, 22 Mad. 398, 423, 9 M. L. J. 67, 1 Bom. L. R. 220, 3 C. W. N. 427; *Kunwar Basant v. Kunwar Brij* 92 I. A. 180, 191, 195, 57 All. 494.

(2) that he was given in adoption after his investiture with the sacred thread ;

(3) that the adoptee was older than the adopter (v) ;

(4) that the adoption was made during pollution (p) or by an unchaste widow (p) or by a widow after paying money to the boy's natural father (q) or by an untoussured widow (r) ;

(5) that the adoption was made by the younger without the consent of the elder widow (s) ;

(6) that the adoption was made by a leper (t) ; or by one suffering from incurable disease (u).

In case of marriage three leading principles governing the application of this maxim have been deduced from **(2) As regards marriage.** *Venkatacharyulu v. Rangacharyulu* (v) :

(1) Where there is a gift by a legal guardian and the marriage rite is duly solemnized with the ceremonies of *Pagdanam* (the promise to give) **वाग्दान** and *Saptadihoma* **सप्तदी होम** the marriage is irrevocable, (w).

(2) Where the girl is abducted by *fraud or force* and married, and there is *no gift* either by a natural or legal guardian, there is fraud upon the policy of religious ceremony though there is no valid religious ceremony.

(3) Where the mother of the girl, acting as her natural guardian in view of her welfare and without fraud or force, gives away the girl in marriage and the marriage rite is duly solemnized, the marriage is not to be set aside.

The texts regarding the eligibility of persons who can claim the right of giving a girl in marriage are directory and not mandatory (r) and this doctrine would remedy the want of consent of a guardian with

(o) *Gopal v. Vishnu* 23 Bom. 250, 257.

(p) *Basvant v. Malappa* 45 Bom. 459, 1921 Bom. 301, 22 Bom. L. R. 1400, *Contra*. *Sayamalal v. Sandamini* 5 Beng. L. R. 362; *Dnyoba v. Radhabai* (1894) P. J. 22.

(q) *Murugappa v. Nagappa* 29 Mad. 161, 16 M. L. J. 22; *Sitaram v. Harihar* 35 Bom. 169, 8 I. C. 625, 12 Bom. L. R. 910.

(r) *Ravji v. Lakshmi Bai* 11 Bom. 381, 395.

(s) *Padajirao v. Ram Rao* 13 Bom. 160.

(t) *Sayamalal v. Sandamini* 5 Ben. L. R. 362, 369, 370 cited in *Keri v. Moneram* 13 Bom. L. R. 1, 14 (F. B.).

(u) *Indramoni v. Behari Lal* 5 Cal 770, 774 (P. C.).

(v) 14 Mad. 316, 320, 1 M. L. J. 85.

(w) *Bindaban Chandra Karmokar v. Chundra Karmour* 12 Cal 140; *Khushalchand Lalchand v. Bai Mani* 11 Bom. 247.

(x) *Mulchand v. Bhudhiu* 22 Bom. 812; *Khushal Chand v. Bai Mani* 11 Bom. 247; *Ghazi v. Sakru* 19 All. 515; *Namasvayan Pillai v. Annami Ammal* 4 Mad. 339; *Madoosoodun Mookerji v. Jadub Chaudar Banerji* 3 W. R. 194; *Venkata Charyulu v. Ranga Charyulu* 14 Mad. 316, 1 M. L. J. 85; *Bai Diwali v. Moti Karson* 22 Bom. 509; *Brindaban Chaudra v. Chundra Karmokar* 12 Cal. 140; *Rampiyari v. Deru* 1 Rang. 129, 1923 Rang. 202; *Ram Harakh v. Jagar Nath* 59 All. 815, 1931 A. L. J. 816, 1932 All. 5; *Jagan Nath v. Basant* 1923 Lah. 595.

a preferential claim to give the girl away (c). So the marriage of a minor girl celebrated by the mother in disobedience to the order of the civil court was held to be irrevocable (p). Similar effect has been given to the texts prohibiting marriages with the *guru's* daughters, girls having hideous names or having no brothers (c). On the same ground where a marriage was effected by the maternal grandfather and the maternal uncle of the girl, there being no evidence of force or fraud, the court applied this doctrine although the marriage was against the wishes of the paternal relatives of the girl who desired to make a profit by marrying her to a rich but one-eyed man (a).

The texts which prescribe rules for the consent of guardians in marriage have been held to be merely directory; hence a marriage once performed and solemnised, though without the consent of the legal guardian, has been held by our courts to be valid (b). So the marriage celebrated by a mother, without the consent of the father, although according to the texts the father is the person who has a preferable claim to give a girl in marriage, was held valid.

Jimutavahana has applied the doctrine to the case of an alienation by a father of his self-acquired property or his undivided share in joint family property. It has been contended by the learned author that since the father has ownership in his self-acquired property, the nature of the thing, *i. e.*, ownership and its incidents, such as sale or other alienations cannot be altered by a hundred texts preventing such alienation, such texts being construed as directory only and not mandatory.

The doctrine of *factum valet*, however, does not excuse the violation of a legal rule (c). Adoption, being in the nature of a gift contains three elements: (1) capacity to give, (2) capacity to take and (3) capacity to be the subject of being given or taken, which are essential to the validity of the transaction as such and are beyond the scope of this doctrine (d). Since there must be some one to give, the adoption of an orphan is invalid (e)

(1) *Bai Diwali v. Moti Karson* 22 Bom. 509.

(2) *Veerasami v. Appasami* 1 M. II. C. R. 375.

(a) *Kasturi v. Chiranjil Lal* 35 All. 265.

(b) *Mulohund v. Bhudhia* 22 Bom. 812.

(c) *Budansa v. Fatma* 26 M. L. J. 260, 266, 22 I. C. 697.

(d) *Per Muhammad, J. in Gunga Sahai v. Lekhraj Singh* 9 All. 288; See also *Sri Balusu v. Sri Balusu* 22 Mad. 398, 423.

(e) *Balvantran v. Bayabai* 6 Bom. H. C. R. 83; *Subbaluvannal v. Annakutti*

Annal 2 Mad. 129; *Vaithilinga Mudali v. Murugian Mudali* 23 M. L. J. 189, 37 Mad. 529, 15 I. C. 299, 1912 M. W. N. 1127; *Dhanraj Joharmal v. Soni Bai* 52 Cal. 482, 27 A. L. J. 273, 27 Bom. L. R. 837, 52 I. A. 231, 1925 M. W. N. 692, 30 C. W. N. 601, 49 M. L. J. 173, 1925 P. C. 118; *Sukhbir Singh v. Manggisar* 49 All. 302; *Bushetiappa v. Shirlingappa* 10 Bom. H. C. R. 208; *Mureyya v. Ramalakshmi* 44 Mad. 260, 12 L. W. 613, 1921 Mad. 381, 39 M. L. J. 495, 1920 M. W. N. 708.

unless it is supported by a special custom (*f*). In such cases this doctrine cannot be invoked to validate it (*g*). So the adoption of a *palak putra* or a *putrika putra* cannot be held valid (*h*).

Adoptions and marriages as are specifically prohibited by law can never be validated and this doctrine will have no application in such cases (*i*). This maxim is also not available to validate a marriage where a Hindu woman having a Hindu husband, after becoming a convert to Islam, married a Muslim without getting the first marriage dissolved (*j*). The adoption of an orphan cannot be validated under this doctrine as the rule that a boy can be given in adoption only by his parents is a mandatory one (*k*). In this case the precept is legal and mandatory, and, therefore, the principle of *factum valet* is ineffectual in the case of an adoption in contravention of the provisions of those texts (*l*).

In short the maxim does not apply where the texts are mandatory and the adoption is in violation of the mandate or prohibition, *e. g.*, (1) gift in adoption, by a widow, of her only son without her husband's authority; (2) adoption of a daughter's son or sister's son and (3) adoption of mother's sister's son.

SECTION 6. CHRONOLOGY OF ANCIENT HINDU JURISTS AND THEIR WORKS

To have a reliable chronology of the Sutras, Sastras, Digests and Commentaries and to know their sequence is difficult. The existence of conflicting rules in different Smritis or in the same Smriti, the obsolete maxims and the details of extinct usages without any mention of the reason therefor, makes the task all the more difficult. Nevertheless, chronology is essential for the purpose of having a correct idea of the history and development of Hindu Law.

The Brahmins studying Vedas split themselves into various *sakhas* or branches; and owing to the adoption of different **Dharmasutras**, interpretations, schools for the different recensions of the same Veda were formed under the guidance of eminent teachers.

(f) *Ramkishore v. Jainarain* 49 Cal. 120.

(g) *Mareyya v. Ramalakshmi* 44 Mad. 260.

(h) *Kalle Chunder Choudhary v. Shile Chunder* 6 B. L. R. 501 (P. O.); *Nursing Narayan v. Bhuttor* Lal W. R. (1864) 194.

(i) *Lakshmappa v. Ramaya* 12 Bom. H. C. R. 364; *Gopal v. Hanmant* 3 Bom. 273; *Bhagirthibai v. Radhabai* 3 Bom. 298; *Ganga Sahai v. Lekhraj Singh*, *supra*.

(j) *Badamea v. Fatma Bai* 26 M. L. J. 260, 22 I. C. 697, 1914 M. W. N. 278.

(k) *Ram Kishore v. Jai Narain* 48 I. A. 405, 49 Cal. 120, 1922 P. C. 2, 15 L. W. 144, 42 M. L. J. 80, 26 C. W. N. 881, 20 A. L. J. 857, 1922 M. W. N. 125; *Mareyya v. Ramalakshmi* 44 Mad. 260, 39 M. L. J. 495, 1920 M. W. N. 708, 12 L. W. 613, 1921 Mad. 331.

(l) *Lakshmappa v. Ramva* 12 Bom. H. C. 364, 398; 22 Mad. 398, 26 I. A. 113, 144; *Ganga Sahai v. Lekhraj* 9 All. 253, 296-97; *Gopal v. Hanmant* 3 Bom. 273, 293-94; *Padujirav v. Ramrav* 13 Bom. 160, 167; 22 Bom. 812 *supra*.

Sutras or strings of aphorisms chiefly in prose were framed or composed for the facility of teaching. Every department of the Vedas had its own *sutras*, e.g., *Dharmasutras* relating to law and religion and *Srautasutras* and the *Grihyasutras* dealing with the more formal and domestic rituals, the whole being regarded as *Kalpasutra*.

Professor Max Muller and Professor Hopkins hold that the *Sutra* period roughly ranges from 600 to 200 B. C. The **Their period 600-400 B. C.** *Dharmasutras* of **Gautama, Baudhayana, Apastamba** and **Vasistha** are considered by Dr. Buhler, Dr. Jolly and P. V. Kane to be the most ancient of the law books and as regards their sequence, they place them in the order mentioned above. The reference in all these cases is to the books in their extant form for, as P. V. Kane points out, works on *Dharmasutras* existed even before 600-300 B. C. The learned author says :

"It is very difficult to settle the chronology of works on *Dharma-sastras* particularly the earlier ones. The present writer does not subscribe to the view of Max Muller and others that the works in continuous *anustubha metre* followed *Sutra works*. Our knowledge of the works of that period is so meagre that such a generalisation is unjustifiable. Some works in the *continuous slokas like Manu*, are certainly older than *Vishnu Dharmasutra* and probably as old as, if not older than, the *Vasistha Dharmasutra*. One of the earliest extant *Dharmasutra* of Baudhayana contains long passages in the *Sloka metre*. This renders it highly probable that works in the *Sloka metre* existed before them. Besides, a large literature on *Dharma* existed in ancient days especially of Baudhayana, which has not yet been traced. In the absence of that literature it is futile to dogmatise on such a point. It seems that originally many though not all *Dharmasastras* formed part of the *Kalpasutras* and were studied in distinct *sutra Charans*. Some of the extant *Dharmasutras* show unmistakable marks that they presupposed the *Grihyasutras* of the *Charans* to which they belonged. Compare *Apastamba Dharmasutra* with *Apastamba Grihyasutra*, *Baudhayana Dharmasutra* with *Baudhayana Grihyasutra*. The *Dharmasutras* belonging to all *sutra charanas* have not come down to us. No *Manu Dharmasutra* has yet come into existence, although *Manavasutras* and *Grihyasutras* are extant. In the same way we have *Shankhyasutras* and *Grihyasutras*, but no *Sakhyayanadharmasutras*. It is only in the case of *Apastamba* and *Baudhayana Sutracharanas* that we have a complete *Kalpa* tradition with its three components of *Shrauta Grihya* and *Dharmasutra*."

Taking these points into consideration we can presume that the *sutra* period dates from the 6th century B. C. and runs up to the

beginning of the Christian era. As to the *Dharmasūtras* of *Gautama* whom P. V. Kane considers the oldest of the *Sūtra* writers, he gives the date as not later than 600 to 400 B. C.

Gautama. Gautama who belonged to the age of *Samaveda* is the most ancient jurist as quoted by Bandhayana. His view is that *sapindas* and *sagotras* including those descended from the same *rishi*, as well as the wife, shall share the estate of a person who dies without male issue or an appointed daughter, and that the son of a Brahmin by a Kshatriya wife shares equally with his brother born of a Brahmin wife, but the son of a Sudra wife is entitled to maintenance only. According to him, unmarried daughter would succeed first to a woman's *stridhana* and on her failure, succession would devolve on married daughters. Haradatta wrote his commentary on the *Mitākshara*, in the twelfth century A. D.

Baudhayana. Bandhayana belonged to the Black Yajurveda. He classifies the twelve kinds of sons into two sets, one entitled to inherit and the other to be members of the family only. As regards *Kshetrajña* he declares him to belong to both the families for the purposes of inheritance and offering of funeral oblations.

Apastamba. Apastamba also belonged to the Black Yajurveda. Dr. Bühler, Dr. Jolly, and P. V. Kane assign his *Dharmasūtra* to the fourth or the fifth century B. C. Dr. Jayaswal agrees with Dr. Jolly assigning his work to the fifth century B. C. He has emphatically denied the practice of *Niyoga* and recognises only six marriage rites, omitting the *Pṛasācha* and the *Prajāpatya*. He does not recognise the secondary sons, not even the adopted son. He admits the nearest *sapindas*, the spiritual preceptor, the pupil and lastly the daughter as heirs. Haradatta has written a commentary of Apastamba's work called the *Ujjvala* in the (twelfth century A. D.).

Vasistha. Vasistha belonged to the Rig Veda. P. V. Kane (p. 59), assigns him the period ranging from 300 B. C. to the beginning of the Christian era. He does not recognise the right of a Dwija to take a Sudra wife and recognises only six marriage rites, like Apastamba. He permits the re-marriage of virgin widows (XVII. 74, and prescribes the rate of interest to be 15 per cent as mentioned by Manu (VIII. 140). As to inheritance, he only says that *sapindas* are to inherit, and on their failure the spiritual teacher and the pupil. He favours gifts, specially those of learning. He recognises the twelve kinds of sons, six as heirs while the other six as kinsmen only. He differs from Apastamba and holds that the father and the mother have power to give or sell their son and even to abandon him, and has favoured the position of the *dattaka*,

Vishnu Smṛiti, partly in aphoristic style and partly in verse, is intimately connected with the Manu Smṛiti and also with Yajñavalkya Smṛiti (*m*). Dr. Jolly assigns it a date not earlier than the third century A. D., but at the same time thinks that some portions of the work both in style and structure, bear the mark of extreme antiquity and that Vasistha and Baudhyana probably borrowed from it (*n*). Yajñavalkya considers it as one of the authoritative Smṛitis (*o*). Vishnu differs from Manu and makes a distinction between the self-acquired and ancestral property like Yajñavalkya and gives equal rights to the father and the son in ancestral property (*p*). He allows re-union and assigns eighth position to the adopted son and places, in the order of succession, the son begotten on a widow or a wife by a near relation before the son of the appointed daughter. The son, grandson, great grandson, the widow, the daughter, her son, the father, and the brother are according to him the heirs of a deceased in the order mentioned above.

Baudhayana, Vasistha and Apastamba often quote Harita (*q*) but the copy of the manuscript discovered at Nasik does not contain any quotation from Harita by Apastamba and Baudhayana (*r*). Harita, Hiranyakesin, Kasyapa, Sankha, Likhita and Patthinasī all of whom are quoted in Jagannatha's Digest and by the commentators are also of the Sūtra period. Harita lived earlier than Baudhayana and Hiranyakesin later than Apastamba (*s*).

The question as regards the age of Manava Dharmasastra from its external and internal evidence is mixed up with other problems such as whether there are earlier or later Sūtras in the extant Manava Dharmasastra, whether Manava Dharmasastra was recast several times or once only, what relative relations exist between the Manava Dharmasastra and Manava Bharat. P. V. Kane tackles this question with ability and the result of his dissertation may be stated as follows :—

(1) The theory of Bühler following Max Müller that Manava Dharma Sastra is based upon or is a recast of ancient Dharma Sūtra, *viz.*, that of the Manava charan is unsupportable.

(2) It is impossible to say who composed Manava Dharmasastra.

(3) As regards its external and internal evidence Kane looks upon

(*m*) Jolly, 15 ; S. B. E. Vol. VII, 22, 25 ;
P. V. Kane (p. 63) points out that 160
verses of the Manu Smṛiti are found
in this.

(*n*) S. B. E. Vol. VII, Introduction 18, 19,
22, 32.

(*o*) I. 4.

(*p*) XVII, 2.

(*q*) P. V. Kane 70, Jolly L. and O. 15-18.

(*r*) Jolly L. and O. 15.

(*s*) S. B. E. Vol. II, Bühler's Introduction
24, 25, 28.

the extant Manava Dharmasastra as the most authoritative Smṛiti. That position it could not have attained unless several centuries had intervened between it and these writers. Therefore, it must be presumed that Manava Dharmasastra had attained its present form at least before two centuries A. D.

(4) There can be no doubt that the Manava Dharmasastra contains earlier and the later *śrauta*, because on numerous points the Manava Dharmasastra contains conflicting doctrines. In Manu III. 12 and 13, a Brahmin is allowed to have a Sudra woman as his wife while in III. 14 to 19 it is emphatically asserted that a Sudra woman cannot be the wife of a Brahmin, and heavy disabilities are prescribed for him who breaks the injunction. Bühler cites several passages and says that they were put in when the work was versified from the Manava Dharmasutra. Though one may not agree with all the details of Bühler's examination and with his theory about the versification of Manava Dharmasutras, it may be admitted that most of the passages pointed out by him have rather the trend of modernity about them. The original Manava Sastra in verse had additions made in order to bring it in line with the changed conditions and general attitude of people of those times on several points such as those of meat eating, Niyoga, etc. But all these additions must have been made long before the third century A. D. as the quotations from Vrihaspati and others show.

(5) The theory that Manava Sastra had undergone several recasts does not seem likely and the evidence adduced in its support is quite inadequate.

(6) Turning to the internal evidence, the extant Manava Sutra seems to be much older than Yajñavalkya, as the rules of judicial procedure are incomplete and awkward in Manu as compared with Yajñavalkya and also because there is no reference of documents, treatment of ordeals and legal definitions are almost absent, while they are frequently to be found in Yajñavalkya. Further as Manu is silent about a widow's rights while Yajñavalkya gives her the first place amongst the heirs of a sonless man, so Manava Sastra will have to be placed some centuries earlier, say, in the third century A. D.

(7) In chapter X. 44 Manu mentions the Yavanas, Kambojas, Shathas, Pallavas and Sinnas and in X. 48 Medhas, and Unkalaras. This shows that the extant Manava Sastra could not be much earlier than 300 B. C.

(8) The extant Manava Sastra in its arrangement of doctrines is identical with the ancient Dharma Sastras of Gautama, Baudhāyana and Apastamba.

P. V. Kane concludes, taking all these things into consideration,

that *Buhler* was certainly right in saying that the extant *Manava Sastra* was composed between the *second century B. C. and second century A. D.* But the question of date of the original *Manava Sastra* to which additions were made between the *second century B. C. and second century A. D.* presents very great difficulties. That question is largely bound up with the relations of *Manava Bhurata* to the *Manava Sastra*.

With regard to this question *P. V. Kane* remarks :—“In my humble opinion the following seems to be the relation between *Manava Bharata* and *Manava Sastra*. Long before the 4th century B. C. there was a work on *Dharma Sutra* composed by or attributed to *Swayambu Manu*. This work was most probably in verse. There was also another work on *Rajdharma* attributed to *Pracheta Manu* which was also prior to 4th century B. C. It is not unlikely that instead of there being two works, there was one work embodying rules on *Dharma* as well as politics. This work was the original kernel of the present *Manava Sastra*. Then between the 2nd Century B. C. and the second century A. D. the *Manava Sastra* was finally recast probably by *Bhrigu*. That work must have compressed the older work in some cases and expanded it in others. This hypothesis would explain why some of the verses and views quoted as *Manu's* occur in the extant *Manu Smriti* and some do not.

Dr. Buhler is the first translator of the *Manu Smriti* (Vol. XXV S. B. E.). *Sir William Jones* and *Dr. Jha* come next. It has always been treated by *Hindu sages* and commentators from the earliest times as of paramount authority (*i*). In *Taittiriya Samhita* (II. i. 5-6) and the *Tandya-mahā-brāhmaṇa* it is said “Whatever *Manu* says is medicine (*j*).” *Bṛhaspati* and *Angirasa* also assign the first rank to *Manu Smriti* amongst all the *Smritis* in case of any conflict (*k*). The personality of *Manu*, the ancestor of mankind, is of course mythical. The present *Smriti* purports, on its face, to be an abridgment (*l*). It is also found that a mention is made of a *Vṛiddha* or old *Manu* as well as a *Bṛihat* or large *Manu*. *Buhler* and *Mandlik* are of opinion that those works were by different authors (*m*). *Dr. Buhler* and *Professor Max Muller* conclude that the present *Bṛhatsaṃhitā* is the first and most ancient recast of a *Dharmasastra* attributed to *Manu* which must be identified by *Manavadharmasutra* (*n*). *Dr. Jayaswal* and *P. V. Kane* are of opinion

(i) “The most revered of all the Rishis or sages is *Manu*” —*Sri Balusa's case* 26 I. A. 113, 129, 22 *Mud.* 398, 409; “*Manu's Code* has always been regarded as of paramount authority” —*Amarendra's case* 60 I. A. 242, 248, 12 *Pat.* 642; *Manu* may properly be referred to when it is necessary to revert to first principles—*Ramalakshmi v.*

Sevanantha 14 M. I. A. 570, 591.

(j) *P. V. Kane* 136-37.

(k) *Smriti Chandrika* and *Viramitrodaya* cited in *Jha H. L. S.* I, 17, 43, 44.

(l) *Medhatithi* III, i, 19.

(m) *Dr. Buhler S. B. E.* Vol. XXV, Introduction 96-97 *Mandlik Introduction* 23-24.

(n) *S. B. E.* Vol. XXV, *Buhler's Introduction*.

on very authentic grounds that there was no such work as Manuvadharmasūtra (a).

P. V Kane suggests that for fixing the date of Yajñavalkya it may be presumed that in the first quarter of the ninth century Viswarupa wrote his commentary and referred to Yajñavalkya and that several centuries separated Viswarupa from Yajñavalkya. Dr. Jolly lays great emphasis in assigning a later date to Yajñavalkya on the ground that Kumarila who cites Gautama, Manu, Apastamba and Baudhayana ignores Yajñavalkya's Smṛiti altogether. "But this silence of the great Mimāṃsaka can only mean that he did not assign the same pre-eminence and venerable position to Yajñavalkya three or four centuries earlier than Kumarila. On comparing the doctrines of Narada and Brihaspati, who have been placed as not later than 500 A. D., and those of Yajñavalkya, it will have to be conceded that the former represent far greater advance and exactitude in juristic principles than the latter. Thus Yajñavalkya cannot be placed later than the third century A. D. He is shown to have followed Manu and Kautilya. His Smṛiti cannot be placed earlier than the first century B. C. We shall not be, therefore, far from truth if we place his Smṛiti somewhere between the 1st century B. C. and the 3rd century A. D. Dr. Jolly following Dr. Jacoby thinks that Yajñavalkya appears to have acquaintance with Greek astrology. Dr. Jacoby's position amounts to this that the naming of the week days after the planets was established among the Greeks towards the end of 2nd century A. D. and as the names of week days and arrangement of planets corresponding with them was borrowed from the Indians by the Greeks, no Indian work which enumerates the week days or arranges the planets in the well-known sequence could have been composed before the second century A. D. Kane thinks that this generalisation is based upon very slender data. The premises are mere assumptions with hardly any evidence worth the name to support them.

Yajñavalkya speaks of the yellow-robed people as an evil omen which is probably a reference to the Buddhists. He speaks of the founding of the monasteries of the Brahmins, learned in the Vedas. The philosophical doctrines contained in the third *section* of his code resembled that phase of the Vedānta which was taught by Shanker. All these points are, however, of very little use in arriving at any definite age of Yajñavalkya. The foregoing discussion establishes that Dr. Jolly's date is much later than the data warranted. There is nothing to prevent us from holding that the extant Smṛitis were composed during the first century of the Christian era or even a little earlier.

(a) Jayaswal's Manu and Yajñavalkya 48 ; P. V. Kane 79-85.

It has been said that as the code of Yajñavalkya refers to the *Grāhas* or planets, it must be later than the 2nd century A. D. Bühler contends that there is no authority to date a work in the 4th century A. D. having reference to the Greek astronomy; and his view finds support from the fact that Ptolemy has now been proved not to be the founder of the so-called Greek astrology. So it is incorrect to say that the earlier Dharmasāstras did not know the *Grāhas* mentioned in Yajñavalkya. Baudhāyana's Dharmasūtra not only knew them but placed them in the same order as Yajñavalkya, with the same addition of *Rahu* and *Ketu*. Thus Yajñavalkya simply borrowed them from Baudhāyana. Similarly reference to *Ganesa* or *Ganpati* does not prove any later date of Yajñavalkya. Yajñavalkya counts the *Nakṣatras* from *Kṛittika* as the first [I. 267] which was the ancient system. The *Nakṣatras* were reckoned from *Āsvini* but were given up in the Gupta period. This goes to prove that Yajñavalkya Smṛiti existed even before the Gupta period. This prior existence is also borne out from the political and social *data* now available, as for instance, ethnic definition of *Āryavartā* as given by Manu was at that time possible, while in the time of Yajñavalkya it was not so, as in the period before the rise of the Guptas the very centre of Aryan culture and orthodoxy had come under the sway of the Mlechchhas.

The mention of punishment for the forgery of coin called *Nanaka* (II. 240-54) proves the period to be the end of the Satavahana and about the middle of the Kushan rule. Kanishka who founded his dynasty about the end of the first century A. D. named his gold coins *Nana*. His coins were termed *Sivite* whose other name was *Nanaka*. The rule of Kanishka extended up to Benares and Ajodhia and probably up to Pataliputra. The period of the Yajñavalkya Smṛiti in view of the above *data*, therefore, would be about 150-200 A. D. (a).

Next in authority to Manu is Yajñavalkya Smṛiti. Yajñavalkya belonged to the white Yajurveda and is closely connected with the Brihadaranyaka Upanishad and his home is stated in the Smṛiti itself as Mithila (North Bihar). Professor Stenzler considers it to be founded on that of Manu. Yajñavalkya Smṛiti is more concise, more systematic and better arranged than the Manu Smṛiti and Yajñavalkya's words correspond closely with the text of Manu in most cases (b).

The venerable sage Narada, a native of Nepal, seems to have abstracted his work from the second abridgment of Manu in 4,000 verses, and follows Yajñavalkya though he often differs from Manu. He is the first to give us a legal

(a) K. P. Jayaswal—Manu and Yajñavalkya, p. 61. (b) P. V. Kane, 172, 176.

code unhampered by the mass of religious and moral teaching, characteristic of the earlier Dharmasastras. He propounded the theory that laws were proclaimed by kings and royal ordinances could override the Smṛiti law. His treatment of the rules of procedure and pleading is remarkable. Yajñavalkya never mentions Narada as the author of a Smṛiti but Viśvarūpa commenting on Yajñavalkya quotes a verse of Vṛidha Yajñavalkya which refers to Narada, Baudhayana and Saunaka (a)

He allows re-marriage of a widow and does not recognise her as an heir. He places an adopted son as the ninth in rank and excludes him from the list of collateral heirs. These differences are probably due to the customs of that part of India with which he was more familiar.

Dr. Jolly assigns him 4th or 5th century A. D. as the term *dinara*, mentioned by Manu, could not have come into existence before the 2nd century A. D. (b). P. V. Kane quotes Dr. Keith to the effect that the introduction of the *dinaras* into India need not be later than the beginning of the Christian era and that the Indo-Scythian coins, equal in weight to *dinara*, were prevalent from the 1st century B. C. and hence he places Narada between 100 to 300 A. D. (c).

Bṛihaspati Smṛiti is available only in fragments. P. V. Kane assigns Bṛihaspati the period 200-400 A. D. (d).
Bṛihaspati
200-400 A. D. Like Narada, Bṛihaspati permits gambling in public places and like Manu condemns the practice of *Niyoga* and on this point he differs from Yajñavalkya. He holds that only the *aurasa* son and the son of the appointed daughter shall be heir of the father's wealth and that all others have only a claim to maintenance (e). He assigns equal rights to the father and the son in the ancestral property like Yajñavalkya. His views as regards females are very liberal and he admits the rights of the widow, the daughter and the mother as heirs (f) and allows re-union amongst separated co-parceners. He laid down for the first time a distinction between the Civil and Criminal Justice. Of the eighteen titles of law he distinguishes fourteen titles as cases of property and the other four as cases of wrongs (g). Detailed rules of procedure and pleadings find place in his work.

(a) Dr. Jolly has translated it S. B. E. Vol. XXXIII.

(b) Jolly Introduction, S. B. E. XXXIII, p. xxviii; Jolly L. & C. 48.

(c) P. V. Kane 203-205.

(d) P. V. Kane, 210.

(e) Bṛihaspati XXV, 35, 39, 40.

(f) Bṛihaspati XXV, 49, 55, 63.

(g) Bṛihaspati II, 5 to 9; P. V. Kane, 208.

Yajnavalkya mentions Katyayana Smriti in his works, but the original work has not yet been traced out; except that only its quotations are found in a number of other works. The special feature of Katyayana is his treatment of the subject of *stridhana*. Visvarupa and Medhatithi regard Katyayana as of equal authority with Narada and Brihaspati, belonging more or less to the same period.

Katyayana. Fragments of other Dharmasastras such as Angiras, Atri, Daksha, Devala, Laugakshi, Prajapati, Pitamaha, Pulastya, Yama, Vyasa, Samvarta and Satatapa are now lost but references to them are to be found in Commentaries and Digests. Some of them have been enumerated by Yajnavalkya as original sources of law, so they must have existed before his time. Many of them are quoted by Medhatithi and must, therefore, be of earlier date than 900 A. D. (a).

Fragmentary Dharmasastras. The Smriti Sangraha or Sangraha whose author is not known is often cited in the Mitakshara, the Smriti Chandrika, Apararka and other works. P. V Kane assigns it a period between the 8th and the 10th century A. D. (b). This work held that ownership arose from the dictates of the Sastras, that property was not temporal and that partition alone created ownership but not mere birth. It gives the order of succession as,—widow, the daughter, who is a *putrika*, mother, paternal grandmother, father, full brother, then the father, grandfather and great-grandfather, other sapindas, sakulyas, the preceptor, pupil and fellow-student.

Parasara. Parasara Smriti is of paramount authority. His work on law is lost and his date is not yet settled. Jivananda's edition and that in the Bombay Sanskrit Series with the voluminous gloss of the great Madhava are the best. Yajnavalkya mentions it (I. 4) among the ancient Smritis. The extant Parasarasmiti is divided into twelve chapters and contains according to the last verse but one 592 verses and deals with *Achara* and *Prayaschitta*. The first chapter lays down that in the four ages of *Krita*, *Treta*, *Dvapara* and *Kali*, the *dharma*s proclaimed by Manu, Gautama, Sankha-Likhita and Parasara were respectively to be the guiding ones. It mentions only four sons, *aurasa*, *kshetrāja*, *dattā* and *Kritima*. The practice of *Sati* is eulogised.

Vijnaneswara 1070—1100 A. D. Vijnaneswara is the author of the well-known commentary, the Mitakshara. His age has been fixed by recent researches to be the latter part of the 11th century A. D. (c) and has been so fixed with reference to his

(a) Dr. Jolly T. L. L. 68.
(b) P. V. Kane, 241.

(c) West and Buhler p. 5 s. 1; Macdonell S. L. 429.

contemporary and patron, the Chalukya King, Vikramaditya VI of Kalyan in Hyderabad (1076—1126 A. D.). He was the son of Padmanabha Bhatta of the Bharadwaj Gotra and lived in the Deccan. He was an ascetic (*Parahans*) and belonged to the Vaishnav sect. He was called *Vijnana—Yogin*, an ascetic of the order of sauyasis founded by Sankaracharya.

Jimutavahana, the author of the Dayabhaga seems to have flourished in the last quarter of the eleventh and the beginning of the twelfth century of the Christian era. Some passages of his work *Kala-Viveka* state the occurrence of certain astronomical phenomena of the sun and the moon in the years 1013 and 1014 of the *Saka* era (corresponding to 1091-92 A. D.; it is so described as if he had seen it himself or that it occurred in his time. This also conforms with the account of Jimutavahana, given by Eru Misra in his *Kala-Karaka*, the social history of the Bengal Brahmins in which he is said to be the seventh descendant of Bhatta Narayana, one of the five learned and virtuous Brahmins who together with the five learned Kayasthas were deputed by the king of Kanyakubja for sound advice on matters of law and religion at the request of Adisura, the king of Bengal, and who reached the then capital, Gour, in Magh of Sambat 999 or 942 A. D. (a). These facts prove his age without any shadow of doubt. Eru Misra also describes Jimutavahana as a Minister and an Administrator of Justice (b) in the Court of of Viswaksena, a king of Bengal.

The works of Halayudha, the last Hindu king of Bengal who flourished in the end of the twelfth century, of Kulluka Bhatta, the celebrated commentator of Manu and of Shulpani held the field prior to Jimutavahana. Jimutavahana quotes the earlier authors such as Bhoj Deva (c), Gobind Raja (d), Chandeswar (e) and Vachaspati Misra, which provide data for the computation of his age. Jimutavahana freely discusses the doctrine of Vachaspati Misra as given in his treatise, *Vivad Chintamani*, which fact goes to show that the two authors were contemporaries.

Though Jimutavahana professes to base his treatise Dayabhaga on the precepts of Manu yet it is not a commentary on any particular code but claims to be the digest of all the codes. It is deemed as a work amending the Mitakshara law in Bengal (f). Their Lordships

(a) *Rajani v. Nitai* 48 Cal. 643, 25

C. W. N. 433, 32 C. L. J. 233, 63
I. C. 50.

(b) G. C. S. Sastri's Translation of Daya
tattva-Preface, 2nd Ed.,

(c) Dayabhaga XI-2, 22; XI-2, 21

(d) Ibid. XI-2, 23; XI-2, 29.

(e) Ibid. II, 27; IV-3, 23; XI-14; XI-4, 3.

(f) *Collector of Madura v. Mootoo* 12
M. I. A. 397, 10 W. R. 17; *Bhugwan-*
deen Doobey v. Myna Bae 11 M. I. A.
487, 507, 9 W. R. 23.

of the Judicial Committee (a) were pleased to remark, "It is true that there is no special discussion on this point in Dayabhaga, but the reason of this omission is obvious. The authority of the Mitakshara, it should be remembered, was at one time supreme even in Bengal, and as the author of the Dayabhaga did not intend to dispute the correctness of all the propositions laid down in that treatise, we need not be at all surprised at his silence in regard to some of them. It is for this reason that the Mitakshara is still regarded as a very high authority on all questions in respect of which there is no express conflict between it and the works prevalent in that school, as may be seen from the remarks made by the Privy Council in the case already referred to.

The leading commentators of Dayabhaga are Sinathacharya, Churamani, Rambhadri, Raghunandana Bhattacharya and Srikrishna Tarkalankara (his treatise is Daya-Karma-Sangraha). Pandit Bharat Chandra Siromani has published the original Dayabhaga with the six commentaries.

On the Smṛiti of Yajñavalkya, Aparāditya wrote a voluminous commentary called Apararka-Dajñavalkya-dharma-sastra-nibandha (published by Anandarama Press, Poona, 1903 in two volumes). The author is called Aparāditya, a Silahara King and owing to his brilliant intellect is known as 'an ornament of the family of Jimuta.' The work professes to be a commentary on Yajñavalkya but in fact it is in the nature of a digest. It quotes profusely from the Griha and Dharma sutras and the metrical Smṛitis. P. V. Kane is of opinion that Apararka knew Mitakshara and so he must have flourished after 1100 A. D. and before 1200 A. D. It is most probable that it was composed about 1125 A. D. and it was introduced into Kashmir, when an embassy was sent from the Konkan King to Kashmir in the reign of Jayasimha. Smṛitichandrika frequently cites Apararka so there is very little distance left between him and the Smṛitichandrika in order that the former may be looked upon as an authority by the latter.

Apararka like Mitakshara does not appeal too frequently to the doctrines of the Purvamimamsa. Apararka is much inferior to the Mitakshara in lucid exposition, in dialectic skill, in subtlety of argument and in the ordered presentation of heterogeneous material. Apararka, like Jimutavahana, bases the right to take a deceased person's property on the superior spiritual benefit conferred by the claimant on the person deceased. Apararka prefers the father over the mother, like the Mitakshara.

(a) *Kerry Kolitane v. Monce Ram Kolita* 776, 7 I. A. 115, 126. See 35 Cal. 721; 19 W. R. 367, 372 affirmed by 5 Cal. 12 O. W. N. 511.

The period of Nilakantha's literary activities can be easily ascertained.

**Nilakantha
1610—1645.**

He was the youngest son of Shanker Bhatta and could thus hardly have commenced his literary course earlier than Kamalakara Bhatta who was the eldest son of Shanker Bhatta's eldest brother. Kamalakara composed *Nirnaya Sindhu* in 1612 A. D. So Nilakantha's activities must have commenced a good deal after 1612 A. D. One manuscript of *Vyavahara Mayukha* bears the date of *Samvat* 1700 (1644 A. D.). This shows that *Vyavahara-tatwa* was composed not later than 1644 A. D. and it refers to the *Vyavahara Mayukha* as already composed. Hence we can say, without being far from the truth, that Nilakantha's literary career falls between 1610 to 1645 A. D. This date is confirmed by the fact that Nilakantha's son, Shanker, wrote *Kandabhaskar* in 1671 A. D.

Nilakantha thus flourished in the seventeenth century (a). He belonged to the learned Bhatta family, the founder of which came from the Deccan and settled at Benares. Under the instructions of Bhagabanta Deva, a chief of Bundelkhund, Nilakantha composed a work called *Bhagavad-Bhaskara* after his patron, consisting of twelve books named *Mayukha* of which eleven are devoted to religious and ceremonial matters and one known as *Vyavahara-Mayukha* deals with jurisprudence (b).

In one of the verses appended by Nilakantha to each of the twelve *Mayukhas* (sections) of his work occurs the following :

"That King gave a command to Nilakantha, the gem of the assemblage of learned men, the ornament of the residents of the Deccan, who was firmly grounded in *Smritis* and who had no equal [in the *Purva Mimansa*] of *Jaimini*. [Nilakantha] courteously bowing to that command read and examined all the works and is now laying the work this *Bhagavad-bhaskara*." [Mandlik's Introduction IXX. viii (11)].

आज्ञप्तस्तेन राज्ञा विबुधकुलमणिदीपिनात्पावतंसो महः श्रीनीलकण्ठः
स्मृतिषु दृढमतिर्जैमिनीयेऽद्वितीयः । आज्ञामादाय मूर्ध्ना सविनयममुना तस्य
सर्वान्निबन्धान्दृष्ट्वा सम्यग्विविच्यान् जगति भगवद्भक्तस्तन्यतेऽयम् ॥

The encyclopaedic *Mayukha* contains the sacred law and ethics of the Hindus; Nilakantha dedicated it to his patron King Bhagwant Deo and called it "Bhagwant Bhaskar." It consists of twelve *Mayukhas* or rays dealing with twelve different topics as under :—

1. *Samskar Mayukh* (Sacraments),
2. *Achar Mayukh* (Rituals),
3. *Samay Mayukh* (Festivals and rites),

(a) See *Narain v. Notiss* 1927 Nag. 121.

(b) V. N. Mandlik's *Hindu Law*, Introduction, lxxiv *et seq.*

4. Shradh Mayukh (Obsequies),
5. Niti Mayukh (Polity),
6. Vyavahara Mayukh (Social duty comprising civil and criminal law),
7. Dan Mayukh (Gifts),
8. Utsarg Mayukh (Dedication of tanks, wells, etc.),
9. Pratishth Mayukh (consecration of idols and temples),
10. Prayaschit Mayukh (Penance),
11. Sudha Mayukh (Purification), and
12. Santi Mayukh (Propitiation of evil spirits).

Very little of the life of Devananda Bhatta is known but it seems he flourished between the twelfth and thirteenth century A. D. As his work *Smriti Chandrika* mentions Mitakshara, its upper limit cannot be placed earlier than 1150 A. D. Their Lordships of the Privy Council said in *Buddha Singh v. Lattu Singh* (a) that Devananda Bhatta is supposed to be a near contemporary of Apararka, but this is not quite correct, since Apararka is quoted several times as an authority to be preferred to Mitakshara. It looks more probable that some time must have elapsed between Apararka and Devananda Bhatta. Hemadri quotes the views of *Smriti Chandrika* probably oftener than those of any other Nibandhakaras. In one place he does not approve of the explanation offered by *Smriti Chandrika* of a verse occurring in the *Mahabharata* about a man with a male issue performing a Shraddha on the 13th *tithi*. Therefore, it follows that *Smriti Chandrika* must have been composed at least a generation earlier than Hemadri, i.e., before 1225 A. D. *Smriti Chandrika* is often quoted by the *Saraswati Vilas*, the *Vijamitrodaya* and the other digests.

Smriti Chandrika is the earliest and foremost authority in the Madras school inhabited by Dravidians, Tallanganas and Karnatas of the Deccan (b). The doctrines of Devananda Bhatta are not recognised in Northern India except that the indeterminate matter of the Mitakshara may be explained by them on analogical grounds (a): Mr. Krishnaswamy Iyer has translated the Dayabhaga portion of this work.

Raghunandana Bhattacharya's work *Ashtavinsati Tattva* is popularly known as *Smriti-Tattva*. It deals mainly with rituals. Dr. Jolly places him early in the sixteenth century, but the Calcutta High Court has, without assigning any reason, held that he flourished in the fifteenth

**Raghunandana
Bhattacharya :**
1490-1570.

(a) 42 I. A. 203, 37 All. 604, 619, 20 C. W. N. 1, 11, 30 I. C. 529, 1915 P. O. 70. *Bhagwande v. Myna* 11 M. I. A. 487, 508; *Collector of Madura v. Mootoo* 12 M. I. A. 397, 437.

(b) Colebrooke's Preface to Mitakshara;

century (a). His work is quoted and criticised by Vyavahara Mayukha and Viramitrodaya. It is certainly earlier than 1600 A. D. As he names Madhavacharya, Shulpani, and Vachaspati, he is later than 1500 A. D. If a tradition is to be believed, he was a fellow student of Chaitanya. He must have been born about 1490 A. D. Chaitanya is said to have been born in 1485 A. D. In his *Jotishtattva* he mentions the year *Shake* 1421 in connection with the position of Visura. That shows that the work was not composed very much long after that date (1500 A. D.). In the same *Tatwa* in calculating the Ravisuankeraṇṭa he takes *Shake* 1489 as its basis, i.e., (1567 A.D.) So it appears that *Tattva* was composed just about that year. A manuscript of the Chandoga Shradhatatva was composed in *Shake* 1497 and Nathaprasad-tatwa in *Shake* 1498. Therefore, he must have flourished in 1575 A. D., that is sometime between 1490 and 1570 A. D. and his literary activity must have spread over a period, as can be inferred from the number of his works.

He is universally respected in Bengal and as regards his authenticity he is next only to Jimutavahana (b). One of his books *Dayatattva* dealing with the substantive law of inheritance is an excellent compendium of Jimutavahana's treatise, although on a few points there are differences.

SECTION 7. SCHOOLS OF HINDU LAW

The word school or its Sanskrit equivalent **संप्रदाय** denotes an

The term 'school' defined. "assembly of teachers and scholars who hold common doctrines or accept the same teachings."

The term 'school of law' seems to have been used by Colebrooke to imply *the different legal opinions prevalent in different parts of India*. The Hindu method of enacting laws was to inculcate the doctrines under the authority of "spiritual brotherhood of ancient India," which doctrines were binding upon the members of various societies. Owing to the growth of custom and the special needs of time and further with a view to reconcile the conflict between the various Smritis which are the original sources of Hindu Law, need was felt for harmonising the law, and this need gave rise to the commentaries called **Cause of the rise of the different schools.** *Nibandhas*. The authority of several commentaries varied in different parts of the country as many of these commentators were either ministers of local rulers or men of learning much respected in the locality, for their knowledge of sacred law. This gave rise to different schools of law which are operative in different parts of India. Thus we find commentators classified as

(a) *Tailakha v. Radha* 23 O. W. N. 970, 971.

(b) *Ramnath v. Durga* 4 Cal. 550, 554,

Maithilias, Gawas, Dakshinatyas, *etc.*, or, in other words, as the legislators of Mithila, Gaya or Bengal, of the south and so on. Properly speaking

Main schools: there are two schools of law, *viz.*, the Mitakshara and the Dayabhaga. The Dayabhaga school prevails in Bengal and the Mitakshara in other parts of India.

The remarks of their Lordships of the Privy Council (*h*) as to the origin of schools of Law may be quoted with advantage :

"The remote sources of the Hindu Law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind *Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose (i).* Thus the Mitakshara, which is universally accepted by all schools except that of Bengal, as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the Dayabhaga in those points where they differ, was a commentary on the Institutes of Yajnavalkya; and the Dayabhaga which, wherever it differs from the Mitakshara, prevails in Bengal, and is the foundation of the principal divergences between that and the other schools, equally admits and relies on the authority of Yajnavalkya. In like manner there are glosses and commentaries upon the Mitakshara which are received by some of the schools that acknowledged the supreme authority of that treatise, but are not received by all."

There are important differences between what are known as the schools of the Mitakshara. To determine the existence of these schools recourse must be had to history. An examination of the history of the origin of schools in general shows that this coincidence is not accidental. The mode in which divergences between the different provinces arose has been correctly stated in the above passage of the Privy Council judgment (in italics). This explanation is right so far as it goes. But it does not say why the particular gloss came to be put by the commentator in question. "The first disruption of the orthodox school was doubtless due to religious differences on the interpretation of Vedas (*j*). The orthodox school of which Jaimini was the founder differed from the school of Vyas in that the one supported the literal

(h) *Collector of Madura v. Mootoo Ramalinga* 12 M. I. A. 397, 435, 10 W. R. 17,

M. L. J. 166, 22 Bom. L. R. 1070, 18 A. L. J. 1049, 57 I. C. 545,

(i) Same view expressed in *Balwant v. ji* 47 I. A. 213, 16 N. L. R. 187, 43 Cal. 30, 25 O. W. N. 243, 247, 39

(j) *Ganga Sahai v. Lekhraj* 9 All. 253, 290.

sense while the other drew from it the conclusion denying the existence of a material world, while both differed from the rationalist reasoning of the Nyaya of Gautama which threw all theories into the crucible of reason. This triangular contest naturally found many adherents. The philosophy of Gautama took hold of Bengal, while the orthodox creed flourished elsewhere. Having once differed in religion the followers of the Nyaya applied the same test to law. And hence arose the two principal sects or schools, which, construing the same text, variously deduced upon some important point of law, different inferences from the same maxims of law. But while the Bengal school stood out in open revolt, there still remained those who though still fighting under the orthodox banner, ventured to differ in details in conformity with the prevailing local opinion and practice. In this process of legal development, schools and sub-schools have been formed."

The Mitakshara school is again sub-divided into five minor schools.

Sub-divisions of the schools.

All these schools acknowledge the supreme authority of the Mitakshara, but they give preference to certain treatises and commentaries relating to certain passages of the Mitakshara (*k*). These subordinate schools differ in some minor matters of detail and are severally accepted in different Provinces, where the Mitakshara is, concurrently with some other treatises or with local customs, accepted as authority, the former yielding to the latter where they differ (*l*). These sub-schools are :—

1. **Benares or Northern School**—where the works supplementing the Mitakshara are Viramitrodaya and Nirnaya-Sindhu. Except in Mithila, and the Punjab, this school prevails in the whole Northern India including Orissa (*m*).

2. **Mithila or North Behar School**—prevails in the districts of Tirhoot and parts of the districts of Purnea, Bhagalpur, Monghyr, Saran and Muckwane bounded by three rivers namely, Gandaka on the west, Kosi on the east and the Ganges on the south. In these parts of the country also, the Mitakshara school, except in certain

(k) *Bhagwandin v. Myna Bai* 11 M. I. A. 487.

(l) See *Sourendra Mohan v. Hari Prasad* 1925 P. C. 280, 52 I. A. 418, 6 Pat. 135, 155, 42 C. L. J. 592, 50 M. L. J. 1, 24 A. L. J. 33, 91 I. C. 1033.

(m) Orissa governed by the Mitakshara School as administered in Bengal: *Parbati v. Jagadish* 29 I. A. 82, 88, 29 Cal. 440, 447. See 1 C. L. J. 388, 403

and 33 Cal. 371, 375; *Amarendra v. Sanatan* (Dompura Raj) 12 Pat. 642, 37 C. W. N. 938; 57 C. L. J. 593, 65 M. L. J. 203, 31 A. L. J. 710, 1933 P. C. 155. Authorities respected are Saraswati Vilasa and works of Sambhu Kara Bajpai and Uday Kara Bajpai. See also *Bishenpirea v. Soogunda I. S.* D. R. 37 (Note); *Narainee v. Hir Kishor* 1 S. D. R. 39 (Note).

matters in respect of which the law of this school has departed from that of the Mitakshara (o) prevails.

3. **The Punjab School**—prevails in the Punjab and is generally guided by customs. The high caste Hindus are presumed to be governed by the Hindu Law and not by customary law (p).

4. **Madras or Dravida or Southern School**—prevails in the whole of the Madras Presidency.

1c5. **Bombay or Maharashtra or Western School**—prevails in almost the whole of the Presidency of Bombay, Sind and Berar (q) where Vyavahara Mayukh became an authority concurrently with the Mitakshara (r). It is a commentary on the Mitakshara (s).

In Gujrat and the Island of Bombay (t) as also in North Konkan (u) the Mayukha surpasses the Mitakshara in authority. In Ahmednagar, Poona and the Khandesh Mayukh is held in authority though not surpassing the Mitakshara (v). But the Mitakshara surpasses all other works in the Maharashtra country and in Northern Canara, Ratnagiri (w) and in Berar (x).

The principle however adopted by the High Court of Bombay and sanctioned by the Privy Council is to construe the two works so as to harmonise them with each other wherever and so far it is reasonably possible (y).

The remarks hold good in case of all the sub-schools of Mitakshara and in case of difference between the Mitakshara and the Dayabhaga, for it has been held that even in Bengal where the Dayabhaga is supreme the Mitakshara is still regarded as a very high authority on all questions in respect of which there is no express conflict between it and the Dayabhaga.

- (o) *Surendra Mohan v. Hari Prasad*, supra; *Chandreshwar v. Bisheshwar* 1927 Pat. 61; *Sabitri v. Savi* 12 Pat. 359, 423, 1933 P. C. 306; *Kamla v. Murl* 13 Pat. 550, 1934 Pat. 393.
- (p) *Misri v. Babu* 1936 Lah. 151.
- (q) *Bajirao v. Almaram* 1930 Nag 265 reversed by P. C. 62 I. A. 139.
- (r) *Collector of Mudra v. Mootoo* 12 M. I. A. 397, 438.
- (s) *Jiwan v. Indra* 1934 Pat. 260; *Gojabai v. Srimant Shahajirao* 17 Bom. 114, 118.
- (t) *Krishnaji v. Pandurang* 12 Bom. H. O. 65; *Lallubhai v. Mankuvarbai* 2 Bom. 388, 418; *Balkrishna v. Lakshman* 14 Bom. 605; *Janki Bai v. Sundra* 14 Bom. 612, 623. See *Bhimabai v. Gurunath* 60 I. A. 25, 1933 P. C. 1, 141 I. C. 9, 37 O. W. N. 210, 1933 M. W. N. 1, 64 M. L. J. 34, 37 L. W. 81, 40 O. W. N. 27, 35 B. L. R. 200, 50 C. L. J. 542, 1933 A. L. J. 363, 57 Bom. 157.
- (u) *Sukharam v. Silabai* 3 Bom. 353; *Jankibai v. Sundra*, supra.
- (v) *Bhugirathi Bai v. Kanhujirao* 11 Bom. 285, 294.
- (w) *Mayne's Hindu Law* 10th Ed. p. 52.
- (x) *Narain v. Tulsiram* 22 N. L. R. 183.
- (y) *Gojabai v. Shrimant Shahajirao* 17 Bom. 114, 118, approved in *Bai Kesserbai v. Hansraj* 30 Bom. 431, 442, 33 I. A. 176; *Bhagwan v. Warubai* 32 Bom. 300, 312.

The Dayabhaga may also be referred to in a Mitakshara case on points on which the latter is silent (g).

But subject to this it has long been established that whatever may be the law intended to be laid down by Smriti writers that law must be sought for in the writings of the particular school. Thus the Madras High Court, while dealing with the question of what property should be regarded as Stridhana, has laid down that what the court has to do is to look to what the commentators who are the authorities in that particular school have said on the subject (a).

The Privy Council have said after stating how the different commentaries had given rise to the different schools of law "The duty, therefore, of an European Judge who is under the obligation to administer Hindu Law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities (Smritis) as to ascertain whether it has been received by the particular school which governs the district with which he has to deal with and has there been sanctioned by usage, for under the Hindu system of law, clear proof of usage will outweigh the written text of law (b)."

Thus under the cover of administering the law of commentaries, because it has been sanctioned by custom of a certain place, the courts have thrown into the back ground the original sources of law, *viz.*, the Sruti and the Smriti. The commentaries, too, in their turn are yielding place to the law reports, as nearly every important point can now be found in the decision of the courts.

The sub-divisions of the Mitakshara school differ between themselves in some matters of detail relating particularly to adoption and inheritance. The most important difference which exists between the western school and the rest relates to the rights of females to inherit. The Benares and Mithila schools, like the Bengal, recognise only five females as heirs *viz.*, (1) widow, (2) daughter, (3) mother, (4) grandmother and (5) great-grandmother. The Madras school, recognises some more but the Western school recognises many more, such as, the widows of Sapindas and Samanodakas, and their daughters who are not recognised by any other school. Again as regards the rights of the female heirs the western school differs from all others in giving an absolute estate to females in the property inherited by them, *viz.*, when the property is inherited from females, and from males into whose family they were born as distinguished from families which they enter by marriage.

(g) *Rai Bischandra v. Asmaida Kuar* 11 I. A. 164, 179, 6 All. 560. | (a) *Salemma v. Intohimana* 21 Mad. 100.
(b) *Collector of Madura v. Mootoo*, *supra*.

Another matter about which there is much variance is the law of adoption, for instance, as regards the rights of a widow to adopt a son to her deceased husband. In Mithila, the widow cannot adopt even though authorised by her husband in his life time. In Benares as well as in Bengal she can adopt, if she has an authority from her deceased husband. In Southern India (Madras school) she can adopt without his authority provided she obtains consent of his sapindas. In western India she can adopt without any consent, if the husband died while separate and with the consent of undivided co-parcener if he died as a member of a joint family.

The Mitakshara is the orthodox and the Dayabhaga the reformed school of Hindu Law. The two differ in particulars as regards the law of inheritance and the joint family system, and here the difference is in the most vital parts. The differences may be summarised as below :—

Distinctive marks and characteristics of each school.

1. *Firstly*, the Dayabhaga lays down the principle of religious efficacy as the ruling canon in determining the order of succession ; consequently it *rejects preferential claim* of the *agnates over cognates* which distinguishes it from the other systems, and arranges and restricts the cognates upon principles peculiar to itself.

2. *Secondly*, it wholly denies the doctrine that the property is acquired by birth in a family which is the corner-stone of the Mitakshara joint family system. Hence it treats the father as the absolute owner of the property and authorises him to dispose it of at his pleasure. It also refuses to recognise any right of the son to a partition during the father's life-time.

3. *Thirdly*, it considers the brother or other collateral members of the joint family as *holding* their shares in *quasi-severalty* and consequently recognises their right to dispose of them at their pleasure while still undivided.

4. *Fourthly*, whether as a result of the last principle or upon independent grounds, it recognises the right of a widow in an undivided family to succeed to her husband's share if he dies without issue and to enforce a partition on her own account.

accepted and current usages. The Vyavahara Mayukh is a digest. The Mitakshara is a running commentary on Yajnavalkya Smriti and holds sovereign sway over the whole of India excepting Bengal. Vyavahara Mayukh though independent of Mitakshara differs very little from it except that it recognises the sister as heir to her brother and treats the estate inherited by the daughter as Stridhana. It has also differentiated between technical and non technical Stridhanas providing special rules of devolution for the latter kind by the male issue in preference to the female issue. But as regards the technical stridhana there is no difference of opinion between the two. In Bombay Presidency Mayukha is of paramount authority while the Mitakshara occupies a secondary place. The Mitakshara is treated as a sort of supplement to Mayukha and the two are interpreted so as to harmonize their doctrines as far as possible.

In spite of the earlier origin the Mitakshara in many respects is more modern than the Mayukha.

The Mitakshara, a commentary on Yajnavalkya Smriti, is acknowledged as the most authoritative record of the laws of the Hindus. Its supreme authority is acknowledged all over India except Bengal and Bombay. Its author is Vijnaneswara, a learned sanyasi. Colebrooke translated its 'dayabhag' portion in 1810 under the patronage of the Government which gave it still wider currency. The learned author of Mitakshara was of a conservative mind who disapproved all new-fangled innovations and rigidly excluded them from his text or only alluded to them with a view to condemn them. While the authors of

Vijnaneswara, Dayabhaga and Mayukha accepted the changes and thus gave their works wide publicity, Vijnaneswara was an erudite Pandit who ruled out all encroachments upon the established usages. He was of opinion that nothing that had been tried by time could fail to be good for the people. His work may be styled as that of a cautious reformer.

SECTION 8. LAW APPLICABLE TO MIGRANTS

Every individual at birth, becomes the subject of some particular country by the ties of national allegiance which determined his political status. He also becomes subject to the law of domicile which determines his civil status. It is a settled principle that no man shall be without a domicile and to secure the end the law attributes to every individual, as soon as he is born, the domicile of the father, if the child be legitimate

Domicile of origin.

or the domicile of the mother, if the child be illegitimate. This is called the domicile of origin and is involuntary. It is the creation of law, not of the party. The term 'domicile of origin' does not mean the domicile of birth but it arises from a man's birth and connections. The *law of domicile* (*lex domicilli*) would, therefore, be the law

Lex domicilli. prevailing at the domicile of origin of a particular individual and if his residence is different, the law of that particular place will be *lex loci*. The two may, therefore, be different. The question arises as to the laws by which Hindus would be governed in cases when they migrate from one province to another or from India to a foreign country. The different schools of law are prevalent in different provinces so it should be considered what is the *lex loci* in India. Amongst the Hindus there is no *lex loci* as the existence of a *lex loci* is inconsistent with the existence of personal communal law. The Hindu Law is personal, being mostly customary; it follows them upon migration to another locality. For instance, the Bengali Hindus of Calcutta are governed by the Dayabhaga not because they are residents of Calcutta but because they are Bengali Hindus, and therefore, they would be so governed whether they were residents of Calcutta or Cawnpore (k). As the population of an Indian town is heterogeneous, it is not safe to premise that any people resident therein are subject to any particular school of law, still there is the *lex loci* in the sense that the natives of a particular place are subject to the school of law of that locality and they have been so bound by common consent. Though strictly speaking there is no *lex loci* as to the personal law applicable to the Hindus still the Courts administer the personal law obtaining in any locality to a Hindu living there unless there is evidence to show that he has adopted any other law or custom (l).

The *lex loci* applies only to persons whose domicile of origin is of that place (m). It follows the linguistic test *e. g.*, those who speak Bengali will be governed by the Dayabhaga law wherever they may reside as Bengal remains their domicile of origin.

By marriage, the wife acquires the domicile of the husband, and the domicile continues during the widowhood unless she adopts a new domicile (n).

Wife's domicile.

Generally speaking, a Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu Law recognized in that province. In the

Lex loci.

(k) *Kulada v. Hari* 40 Cal. 407; contra 409; but see *Murle Das v. Manick* 5. a general statement in *Bhadra v. Bhaji* M. L. T. 181.
10 N. L. R. 34 is unsound. (m) *Ramdas v. Chandra Dassia*, *supra*.
(l) *Ram Das v. Chundra Dassia* 20 Cal. (n) *Kashibai v. Sripat* 19 Bom. 697.

absence of anything to the contrary, the natives of the following places or particular sects are governed by the schools of law noted against them :—

- (i) **Bengal and Assam** ... *Dayabhaga* supplemented by Mitakshara.
- (ii) The **United and Central Provinces, Bihar** (except Mithila), **N. W. Frontier Province, Orissa** and **Sind** (o).
The Mitakshara law prevails in Orissa (p) but the Oriyas of Ganjam in Madras who have now been transferred to Orissa continue to be governed by the Madras School as before (q).
- (iii) **Mithila** in Bihar ... *Mithila*.
- (iv) Island of **Bombay, Gujrat, Northern Konkan** and **Berar** ... *Mayukha* modified by Mitakshara.
- (v) The **rest** of Bombay Province. *Mitakshara* and the *Mayukha*.
- (vi) **Madras** Presidency ... *Mitakshara* modified by (1) Smriti Chandrika (2) Parasara Madhav, and (3) Vir-mitrodaya.
- (vii) The **Punjab** ... *Customary law*, supplemented by Mitakshara.
- (viii) **Powars** of the C. P. ... *Mitakshara* School, not the *Mayukha* school (r).
- (ix) **Raghuvanshis** of Nandurbar who migrated from Oudh and settled in Khandesh. *Mitakshara* (s).
- (x) **Rao Rathor Telis** who settled in the Central Provinces. *Mitakshara* (t).

(o) *Bodumal v. Mt. Kishnibai* 1926 Sind 231; as to Berar see *Narayan v. Tulshiram* 1925 Nag. 329 (F. B.); *Harigir v. Anand* 1925 P. C. 127; as to the tax law of the Central Provinces see *Kesho Rao v. Sadasheorao* 1938 Nag. 163.

(p) See Morley's Digest Introduction; *Jogendro v. Nityanund* 17 I. A. 128, 18 Cal. 151; *Parhati Kuanr v. Jugdish Chauder* 29 I. A. 83, 29 Cal. 432; *Kaler*

Pudo Bannerjee v. Choitan Pandah 23 W. R. C. R. 214; *Raghunand Doss v. Sadhu Churn Doss* 4 Cal. 425.

(q) See *Raghunadha v. Brozo Kishore* 3 I. A. 54, 1 Mad. 69.

(r) *Rukhmabai v. Jaipal* 23 N. L. R. 108, 1929 Nag. 122.

(s) *Babu Motising v. Durgabai* 53 Bom. 242; 1929 Bom. 57.

(t) *Narayan v. Motisa* 1927 Nag. 121.

Hindu Law is personal and so any particular school of it becomes the personal law, and a part of the *status* of every family which is governed by it. All families domiciled in a given place are *prima facie* governed by the law of that place (*u*). And any such family migrating to another province, governed by another law, carries its own law with it (*v*) including any custom having the force of law (*w*). The presumption will be of the adherence of the law of domicile unless it is proved that he had abandoned that law and had adopted the law of his new domicile (*x*). On the same principle of general presumption it can be said that where an area, originally a part of one province subject to one law, is transferred to another province subject to another law, it involves no change of the law to which it was subject (*y*). Thus the transfer of a district from one Province to another for administrative purpose does not affect the personal law of its inhabitants (*y*). The migration from one part to another part of India governed by another school of Hindu Law shall not affect the law regarding succession to land, or to law relating to personal relations. This rule is contrary to the usual principle that the *lex loci* governs matters relating to land, and that the law of the domicile governs personal relations. But in the case of Hindus this law would only apply to any family which, by local usage, had acquired any special custom of succession, or the like, peculiar to itself, though differing from that either of its original, or acquired, domicile (*z*). The reason

(*u*) *Balwant Rao v. Baji Rao* 48 Cal. 30, 38, 39, 47 I. A. 213; *Banamali v. Arjun Sen* 1932 Cal. 730.

(*v*) *Balwant Rao v. Baji Rao*, supra; *Parbati Kumari v. Jagadish Chunder* 29 I. A. 82, 29 Cal. 433; *Balkisen Devchand v. Kunjalal Hirralal* 1930 P. O. 133, 58 M. L. J. 358; *Amba Bai v. Gorind* 23 Bom. 257; *Mailathi Anni v. Subbaraya* 24 Mad. 650 [A Hindu governed by the Hindu Law of Pondicherry (French India) continues even after his migration to British India to be governed by the Hindu Law as administered in French India]; *Govindachandra v. Radha Kirto Das* 31 All. 477; *Khulada Prasad v. Hari Pada* 40 Cal. 407; *Jawahirlal v. Jaranlal* 46 All. 192; *Sundaramier v. Maharaja of Kolhapur* 48 Mad. 1; *Rameshchandra Sinha v. Md. Elahi Buksh* 50

Cal. 898; *Sukhbir Singh v. Mangwar Singh* 49 All. 302; *Tula Ram Sah v. Shyam Lal Sah* 59 All. 848; *Babu Moti Singh v. Durgabai* 53 Bom. 342.

(*w*) *Rana Sheonath v. Badan Singh* 48 I. A. 446, 1922 P. O. 146.

(*x*) *Sarada P. Roy v. Umakanta* 50 Cal. 370; *Jivan Beas v. Myindra* 1934 Pat. 260; *Bhim Rao v. Punjab Rao* 1935 Nag. 24; *Kusamsha v. Baban Rao* 30 N. L. B. 322; *Basanta v. Lala Ram Sunkar* 59 Cal. 859.

(*y*) *Somashekhara v. Mahadeva* 1936 P. C. 18, 40 C. W. N. 243, 70 M. L. J. 159, 62 C. L. J. 528, 38 Bom. L. R. 319, affirming 53 Mad. 297.

(*z*) *Rutheputty v. Rajinder* 2 M. I. A. 132; *Byjnath v. Kopilmon* 24 W. R. 95; *Soorendronath v. Mt. Heeramonnee* 12 M. I. A. 91; *Manik Chand v. Jagat Settani* 17 Cal. 518,

is that in India there is no *lex loci*, every person being governed by the law of his personal status (*a*).

The presumption is always in favour of the retention of the law of domicile by any particular family (*b*). The presumption is strongest if the family practised the ceremonies attending births, marriages and deaths obtaining in the country of its origin (*c*). The presumption again may be rebutted by proving that the family had adopted the law and customs of the place of its present domicile, and then it will be subject to the doctrines of the school prevailing in that place (*d*). It is possible that a family migrating from another place may retain the religious rites and observances of its place of origin, but at the same time adopt the order of devolution of the place to which it has migrated (*e*).

Change of personal law.

The law of domicile is important in this respect that even if nothing more is known of a person except his residence at a particular place, he will be governed by the law of that locality. He cannot change his personal law and the change is possible only when his renunciation of his law of domicile in favour of the law of the place to which he migrated can be proved (*f*). When the variance is once established, presumption is that it continues; and the onus of making out a contrary case would fall upon those who allege the cessation of such custom or law (*g*). The ordinary way of rebutting such a presumption is to show that the family conformed in its religious or social usages to the locality in which it has settled; or that while retaining its religious rites, it has acquiesced in a course of devolution of property, according to the common course of descent of property in that district, among

(a) *Budansa Rowther v. Fatima Bi* 26 M. L. J. 260.

(b) *Mahomed Haji v. Khatu* 43 Bom. 047, 21 Bom. L. R. 85, 51 I. C. 513; *Sukbir v. Mungeisur* 1927 All. 253; *Kasamsha v. Babanrao* 1934 Nag. 59; *Jagdamba v. Anadi* 1938 Pat. 337.

(c) *Jivan v. Indru* 1934 Pat. 260.

(d) *Ram v. Chundra* 20 Cal. 409; *Soorendro v. M. Heeromone* 10 W. R. 35 (P. C.); *Lukkea v. Gunga* W. R. (Gap.) 56; *Kuladu v. Ilaripada* 40 Cal. 407, 16 C. L. J. 311, 17 C. W. N. 102, 17 I. C. 257; *Bhagabati v. Sailendra* 16 C. W. N. 834, 839; *Govind v. Rudha* 31 All. 477, 6 A. L. J. 591, 3 I. C. 56; *Pitambar v.*

Nishi 24 C. W. N. 215, 31 C. L. J. 52; *Balwant v. Baji* 16 N. L. R. 187, 47 I. A. 213, 25 C. W. N. 243, 48 Cal. 30, 39 M. L. J. 166, 23 Bom. L. R. 1070, 18 A. L. J. 1049, 57 I. C. 545. See *Somaselcharam v. Madhudeva* 1936 P. C. 18, 40 C. W. N. 245, 38 Bom. L. R. 317; on appeal from 53 Mad. 297; *Trimbakdas v. Mathabai* 1930 Nag. 225.

(e) *Basantu v. Ramshankar* 59 Cal. 859.

(f) *Balwant Rao v. Baji Rao* 47 I. A. 213, 48 Cal. 30.

(g) *Soorendronath v. Mt. Heeramonee* 12 M. L. A. 81; *Obunnessurree v. Kishen* 4 Whym. 226; *Sonatan v. Ruttun* W. R. Sp. 93; *Pirthe Singh v. Mt* 8 W. R. 261.

persons of the same class (*h*). In such cases it is not open to a member of the family that has adopted the law of his new residence to show that the family has reverted to the original domicile ; such reversion can only be proved by proving a custom (*i*).

In case of the transfer of one district to another province governed by another school of Hindu Law, for administrative purposes, no presumption can be raised that the inhabitants of either district have adopted the usages of the other (*j*).

The law which is applicable to a migrant is the personal law in vogue at the time of his migration and not any subsequent development of that law which may have come into prevalence after his migration (*k*).

Law at the time of migration only applicable.

This view of law appears erroneous (or having a flaw) as the retention of the personal law of a migrant is based on the principle that the law is unseverably connected with his religion. The conservation of their religious observances by the Hindus and the fact that even after migration their connection with their place of origin remains in tact, proves the flaw pointed out above. So it is fallacious to say that they are not bound by the subsequent changes in the personal law of their place of origin. Moreover, the change may be a mere correction of an erroneous view of law or it may be the revival of an old law or custom. It was on this principle that their Lordships of the Privy Council, in a case of migration proved to have taken place before the composition of Mayukh, said, " Although the migration of the Abban Thiakurs took place before the Mayukh was written, it may well be that the rule was in force in earlier times, and that on this point the Mayukh only embodied and defined a pre-existing custom (*l*)."

Where the emigration is to a different country, the presumption that the family has adopted the law of the people among whom it has settled will be more readily made, if it is shown that the members of the family have so acted as to raise the inference that they definitely cut themselves off from their old environments (*m*). Their Lordships of the Privy Council (*n*) laid down the law on the subject thus : " Where

Emigration to another country.

(*h*) *Rajchunder v. Goculchand* 1 S. D. 43, 56; *Chundro v. Nobin Soondur* 2 W. R. 197; *Rambromo v. Kaminee* 6 W. R. 295; *Junaruddeen v. Nobin Chunder Mursh*, 232; per curiam *Soorendronath v. Mt. Heeramonee* 12 M. I. A. 81, 96.

(*i*) *Somasekhara v. Sugathur Mahadava Royul* 70 M. L. J. 159 P. C. affirming 53 Mad. 297.

(*j*) *Vasudean v. Secretary of State* 11

Mad. 157, 162.

(*k*) *Pirthvi Singh v. Court of Wards* 23 W. R. 272.

(*l*) *Chandika v. Muna Kunwar* 24 All. 273, 280 (P. C.); *Jawalita Lal v. Jaran Lal* 46 All. 182.

(*m*) *Abdur Rahim Haji Ismail Mithu v. Halimabai* 43 I. A. 35, 20 C. W. N. 362 364; 30 M. L. J. 227, 18 Bom. L. R. 635, 32 I. C. 413.

a Hindu family migrates from one part of India to another, *prima facie*, they carry with them their personal law and if they are alleged to have become subject to new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrates to another country, and, being themselves Muslims, settle among Muslims the presumption that they have adopted the law of the people whom they joined seems to their Lordships to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India."

It is of primary importance to ascertain first the origin of the family. On its ascertainment the natural presumption will arise in favour of the retention of the law and usages of the place of origin and of the evidence which goes to prove or rebut this presumption, the most direct is succession and next, ceremonies at marriages, births and Shraddhs (*n*). The test for finding whether a family proved to have migrated from one province to another adheres to the law of the former place or has adopted the law of its new domicile, is the mode in which the religious ceremonies are performed (*o*). Where evidence to support immigration of a Hindu family from one province into another is of witnesses who have heard about it from deceased members of the family, it is inadmissible (*p*).

SECTION 9. THE CASTE SYSTEM

A reference to the caste system of the Hindus is essential to understand the Hindu Law properly. The two main castes are : (1) the *Dvijas* or twice-born or the regenerates and (2) the *Antyajas* or Shudras. There are certain differences between the rules of law relating to the twice-born and those relating to the Shudras. On many points the

(n) *Parbati v. Jagadish* 29 I. A. 83, 29 Cal. 433, 6 O. W. N. 490, 4 Bom. L. R. 365; *Sarada v. Uma* 50 Cal. 370, 37 O. L. J. 233. See F.-N. (o) below :
(o) *Rutcheppilly v. Rajunder* 2 M. I. A. 132, 2 Suth. 1 (P. C.); *R. Padma v. B. Doolee* 9. M. I. A. 259, 7 W. R. 41 (P. C.); *Srimaty v. R. Koond* 4 M. I. A. 202, 7 W. R. 44 (P. C.); *Ram v. Kaminee* 6 W. R. 295; *Balwant v. Baji* 47 I. A. 213, 16 N. L. R. 187, 48 Cal. 30, 25 O. W. N. 243, 18 A. L. J. 1049,

39 M. L. J. 166, 23 Bom. L. R. 1070, 57 I. C. 515; *Kulada v. Haripadu* 41 Cal. 407, 17 O. W. N. 102, 16 O. L. J. 311, 17 I. C. 257; *Bhagabati v. Sohodra* 16 O. W. N. 834, 13 I. C. 691; *Vasudeva v. Secretary of State* 11 Mad. 157, 161; *Gobind v. Radha* 31 All. 477, 479, 6 A. L. J. 591, 3 I. C. 563; *Balkisan v. Kunjilal* 51 O. L. J. 237, 1930 P. C. 133.
(p) *Ramchandra v. Ramabai* 1930 Nag. 267.

former are subject to many disabilities from which the latter are free and *vice versa*. The Hindu literature, both

Origin of caste.

legal and religious, teems with allusions to caste from very early times. The Vedas make no mention of caste, though there is an allusion in the *Purushasukte* (q) which is deemed to be a modern interpolation. But the Sutras of Baudhayana and Apastamba take its existence to be an established fact. Mann traces its origin to Brahma, who produced by a thought a golden egg, "in which" he himself was born as *Brahma*, who for the sake of the prosperity of the worlds, caused the Brahmin, the Kshatriya, the Vaishya and the Shudra to proceed from his mouth, his arms, his thighs and his feet and allotted to these their respective duties." These are the four Varanas of which the first three are *Dwijas* or regenerate class; their second birth is deemed to take place after they undergo *Upanayan* ceremony. The Brahmin was enjoined to study, teach, sacrifice and to receive alms; the Kshatriya to protect the people and abstain from sensual pleasures; the Vaishya to tend cattle, carry on trade, lend money and cultivate land; while for the Shudra was ordained the duty to serve the three higher castes.

The Vedas make a distinction between the Arya and the Dasa, the hill and the aboriginal tribes of India, but, subsequently the term Arya became applicable to the first three castes, the rest being relegated to the servile castes. The caste system is a peculiar organisation of the Hindus. The modern Brahmanical priesthood is interested in maintaining it to be a divine institution existing from the beginning of the creation. Some of the Puranas describe castes as coeval with creation but some of them allege that there was originally one caste but subsequently it multiplied in *Treta* or Third Age owing to degeneration. The Mahabharata also says that castes arose subsequently out of differences of character and occupation, but originally there was no distinction of caste or class.

The caste system took its root owing to the difference in colour between the Aryan invaders and the aborigines of India. The Aryans came to India and settled near about the river Indus. Caste in its inception was synonymous with colour and the term *Varna* means nothing more. Subsequently with the multiplication of functions owing to the development of society, the occupations or castes multiplied. The caste system received prominence very lately and gave rise to various sub-castes also.

Caste is an essential institution of Hinduism. The application

Caste Auto- of Hindu Law has been reserved for Hindus
nomy. alone. The reservation of the jurisdiction of caste,

(q) Rig Veda X, 90.

which has been ensured by the legislature, limits the jurisdiction of Civil Courts only to matters of a "civil nature," as it occurs in the Civil Procedure Code (r). The limits as to the authority of the caste and the court may be stated thus:—

(1) The Courts have jurisdiction to adjudicate on all matters relating to any property, office or dignity carrying with it the right to any perquisite or emolument. For example, when the caste sanctions a marriage between a man and a married woman, who has not been divorced or deserted by her husband, the court cannot give effect to such a custom as it allows adultery and is opposed to the established law (s). But in other cases of marriages where one or both parties are illegitimate children or persons of different castes, the court shall decide about the legality or otherwise of the marriage as the caste people regard it (t).

(2) The appointment of a person to an office of dignity connected with no right to property, *e. g.*, of a priest, is within the competence and jurisdiction of the caste and the court cannot interfere. But where certain incidents in the nature of civil rights as against members of a community are involved the court will have jurisdiction over the whole question (u).

(3) The Legislature has armed the courts with certain powers of supervision for the protection and better management of public and charitable endowments. This reservation of control is in accordance with the Sastras which acknowledge that the king is the protector of *Dharma*.

(4) For the rest the powers of the Court are limited to the interpretation and administration of the caste rules intended for persons acknowledging its supremacy.

The title of a person to recognition as Brahmana depends not on heredity but on possession of superior merits. As regards the merits of a Brahmana "Yudhisthira said, 'He is ordained to be Brahmana in whom are found truthfulness, clarity, forgiveness, uprightness, harmlessness, austerity and compassion.' The serpent said 'But, O Yudhisthira! even in Shudras (are found) truthfulness, clarity, absence of wrath, harmlessness, tenderness to living beings and compassion.' Yudhisthira replied, 'If in a Shudra (by birth) the characteristic (of Brahmanas)

(r) *Bhaleshur v. Matagolam* 2 A. W. N. 300.

(s) *Uji v. Hath* 7 Bom. H. C. R. (A. O.) 133; *Narain Das v. Tirlak* 29 All. 4; *Emperor v. Lazar* 30 Mad. 550.

(t) *Muthuswami v. Masilamani* 33 Mad. 342; *Ram Kumari*, In re, 18 R. 264.

(u) *Ghelabhai v. Halgovan* 13 Bom. L. R. 1171.

Can a Shudra be a Brahmana ?

exists, and in a twice-born (by birth) the same does not exist, then the Shudra (by birth) should not be (regarded) a Shudra, nor the Brahmana (by birth) a Brahmana; he is ordained, O Serpent ! a Brahmana in whom is observed the characteristic, and he in whom the same does not exist must be called a Shudra *etc* '." [Aranyak-parvani Ajagara-paiva Ch. 180.]

Yudhishtira : सत्यं दानं क्षमा शीलम् आनृशंस्यं तपो घृणा ।

दृश्यन्ते यत्र नागेन्द्र स ब्राह्मण इति स्मृतः ॥

Serpent :

शूद्रेष्वपि च सत्यं च दानमक्रोध एव च ।

आनृशंस्यमहिंसा च घृणा चैव युधिष्ठिर ॥

Yudhishtira :

शूद्रे तु यद् भवेत् लक्ष्य द्विजे तच्च न विद्यते ।

न च शूद्रो भवेत् शूद्रो ब्राह्मणो न च ब्राह्मणः ॥

यत्रैतल्लक्ष्यते सर्प वृत्तं स ब्राह्मणः स्मृतः ।

यत्रैनञ्च भवेत् सर्पं तं शूद्रमिति निर्दिशेत् ॥

The rules of law laid down for the Sudras are in some respects different from those for the three regenerate castes. For example, ceremonies necessary to validate adoption or marriage by a Shudra are not necessarily the same as in the case of a *Dwijā*; the illegitimate son of a Shudra is an heir but not of a *Dwijā*, inter-caste marriages are very frequent amongst the Shudras; divorces and remarriages are customary. There arises thus the necessity of distinguishing a *Shudra* from a *Dwijā*. The following are some of the tests by which Sudras may be known :

Shudras.

- (a) They do not wear sacred thread.
- (b) Their gods belong to a lower order and are outside the Hindu pantheon, their menfolk do not stamp marks of *sandal* upon their temples.
- (c) Inter-caste marriages and divorces are very common; even a woman may divorce her husband.
- (d) Ordinarily, they bury their dead bodies.

The caste of an individual is determined not by birth but by qualities, as explained in Bhagvata Gita [XVIII, 41—44] : "Of Brahmanas, Kshatriyas and Vaishyas, and also of Shudras, O Enemy.—vanquisher, the actions are different by reason of qualities sprung from the state of Self (or soul), (41) Equanimity, control of senses, austerity, purity, forgiveness, and straightforwardness, knowledge, realisation of knowledge and belief in the next world, are the Brahmana's action sprung

Qualities of different castes.

from the state of Self : (42) Bravery, spirit incapable of bearing insult or censure with impunity, fortitude, dexterity, and also not flying from battle, generosity and commanding disposition are the Kshatriya's action sprung from the state of Self : (43) Agriculture, cattle-tending and trade are the Vaishya's action sprung from the state of Self : and the Shudra's action sprung from the state of Self, has the character of service : (44)."

Though the authorities appear to be clear on the point that caste is determined by means of the qualities, the rule of the caste is heredity.

Heredity is the rule of caste.

The Hindu society is broadly divided into *Dwijas* or twice-born and the *Shudras* or that the following are the four castes (*d*) of the Hindus :

- I. The Dwijas :** (1) the Brahmana, or priestly caste ;
 (2) the Kshatriyas, or warrior caste ;
 (3) the Vaishyas, or agricultural caste.

II The Shudras : (4) the Shudras or service rendering caste. Each of these castes is further divided into a number of sub-castes.

The members of the first three castes are called twice-born or regenerate. The second birth or regeneration consists in the study of the Vedas and in the performance or *samskaras* or sacraments, as Sankha declares :—

विप्राः शुद्धसमास्तावद् विज्ञेयास्तु विचक्षणैः ।

यावद् वेदे न जायन्ते द्विजा ज्ञेयास्तु तत् परं ॥

"Brahmanas (by birth) are, however, regarded by the wise to be equal to Shudras until they are born in the Veda (*i. e.*, learn the sacred literature), but after that (*i. e.*, this second birth) they are deemed twice-born."

The Shudras are denied the study of the Vedas as well as all the sacraments except that of marriage.

The following caste people were held to be Shudras: *Adi Dravidas* (*e*), *Aliirs*, whether *Nandavansis* or of any other sub-castes (*f*), *Nattukottai chettis* (*g*), the *Jats* (*h*), *Kanwars* (*i*), the *Khatiks* of the Punjab (*j*),

Case-law on castes.

- (d) *Chuoturya v. Subud* 7 M. I. A. 18, 4 C. W. N. 1278.
 W. B. 132, (h) *Hira v. Shibu* 6 L. L. J. 442; *Mewa Ram v. Lal* 1927 All. 410.
 (e) *Munickum v. Poongavanammal* 66 M. I. J. 543, 1934 M. d. 323, (i) *Diwan Ramsaran v. Thakur Mahabir*
 (f) *Domar v. Hironli* 54 I. C. 294 38 O. W. N. 511, 513, 59 O. L. J. 341,
 (Nag.), 66 M. L. J. 114, 1934 P. O. 74.
 (g) *Vellaiyappa v. Natarajan* 55 Mad. 1, (j) *Bholar v. Emperor* 181 P. L. R. 1914,
 1937 Mad. 386, approved by P. O. 35 15 O. L. J. 539, 24 I. C. 947.

Maratha Deshmukhs (k), *Panchals* or *Panchal Viswa Brahmins* of *Dharwar (l)* and *Tanwars (i)*.

The *Ahirs* are a class of *Yadavas* and claim to be *Kshatriyas*. The *Gopes* of *Bengal* are also included in *them*. The *Madras High Court* held the *Yadavas*, or *Edayers* to be *Shudras (m)*. They are different from the *Yadavas* of *Northern India*. The *Ramayana Chavadi Thousand Yadavas* are a sub-sect of the *Yadavas (n)*. *Bharbunja* occupy a position higher than the *Karmi* caste (*n*). *Bhatiyas* are treated as twice-born but rank below the *Arovas* and *Banias (o)*. *Bhumikar Brahmins* of *Bihar* have not been held to be *Brahmanas (p)*. The offspring of illicit connection of *Kshatriya* caste is not a *Shudra (q)*. *Surajbansi Rajputs* are said to be high caste *Hindus (r)* but their position has not been made clear even by the *Privy Council* decision (*r*).

There are three classes of *Marathas*, (1) the five families, (2) the ninety-six families, and (3) the rest, in the *Bombay Presidency*. The first two are *Kshatriyas*, and the last *Shudras (s)*. The *Tanjore branch* of the *Marathas* who descended from *Shivaji* belongs to the *Kshatriya* class (*t*). The *Madura Ramayana Chavadi Thousand Yadavas* residing chiefly in *Madura* and adjoining villages are *Shudras (u)*.

The *Allahabad (v)*, the *Patna (w)* and the *Bombay (s)* High Courts have held that *Kayasthas* are *Kshatriyas*. It was so held in *Sind (x)* but the *Madras High Court* refrained from giving any opinion (*y*). But the *Calcutta High Court* has held the

(k) *Jiji Bai v. Zabu* 30 N. L. R. 18, 1933 Nag. 274.

(l) *Kulappa v. Shivappa* 39 Bom. L. R. 1282.

(m) *Vennia Koni v. Vennichi* 51 Mad. 1, 1928 Mad. 299 (F. B.).

(n) *Sohan v. Durga* 24 I. C. 691 (All.).

(o) *Aya v. Thari* 74 P. L. R. 1913, 34 P. W. R. 1913, 19 I. C. 87.

(p) *Sita Devi v. Gopal* 1928 Pat. 375.

(q) *Sitla v. Gajraj* 14 O. C. 227, 12 I. C. 767.

(r) *Sahdeo v. Kusum* 50 I. A. 58, 2 Pat. 210, 27 C. W. N. 901, 37 O. L. J. 369, 14 M. L. J. 476, 25 Bom. L. R. 560.

(s) *Subrao v. Radha* 52 Bom. 497, 504—6,

1928 Bom. 295, 113 I. C. 497.

(t) *Maharaja of Kolahpur v. Sundaram* 48 Mad. 1, 93 I. C. 705, 1925 Mad. 497.

(n) *Mookku Kone v. Annakutti Ammal* 51 Mad. 1 (F. B.), 1928 Mad. 299.

(v) *Tulsi v. Behari* 12 All. 338, 334 (F. B.).

(w) *Ishwari Prasad v. Rai Hari Prasad* 6 Pat. 506, 106 I. C. 620, 1927 Pat. 145; *Rajendra v. Gopal* 7 Pat. 245, 1929 Pat. 51 on appeal to P. C. 10 Pat. 187, 57 I. A. 296, 34 C. W. N. 1161, 1930 P. C. 242 (Bengali Kayastha).

(x) *Ratanchand v. Anandbai* 1933 Sind 53.

(y) *Manick v. Poongovanammal* 1934 Mad. 323, 66 M. L. J. 543.

Bengali Kayasthas to be Shudras (s). The Patna High Court held even the Bengali Kayasthas to be Kshatriyas (w). This case went in appeal to the Privy Council but no opinion was expressed on the point (a).

Since the Calcutta High Court has held that the Kayasthas do not belong to the regenerate caste, it is profitable to consider this matter in detail. The original authorities, the history and the origin of the caste would be very helpful.

The Bhavishya-Purana narrates the story of the creation of **Chitrugupta**, the ancestor of the *Kayasthas*, who after having sprung from the body of Brahma or God the creator, asked him as to what shall be his name and duties and the creator replied, "Because you are sprung from my body (*kaya*), therefore, you are to be called *Kayastha*, and shall be famous in the world by the name of Chitrugupta. Oh ! my son, let your residence be always in the reign of God of Justice, for the purpose of determining the religious merit and demerit of men ; and receiving my irrevocable order, you should observe the Dharma or the law and usage that are proper for Kshatriya tribe, according to Shastras."

The Padma-Purana states, "The usages among different sections of the Kshatriyas are not uniform ; among them the Kayasthas who live by letters, shall attain superiority."

Brahma or God, the creator, declared in Vijnan-Tantra: "As you who are named *Chitrugupta* have proceeded from my body, you will be celebrated in the world as Kayastha. Kayastha is a Kshatriya by caste, but not Shudra by any means."

Identical assertions are to be found in Garur Purana, Sikander Purana (Brahmawatra Khand and Kashi Khand), Mahabharata and Vimadhi, etc. Similar references to Kayasthas are also found in different Smritis (b) and Digests (c). The fact that the Kayasthas are Kshatriyas has been very thoroughly dealt with and established in Kayastha Ethnology (d).

In *Ishwari Prasad v. Rai Hari Prasad* (e), Sir Jwala Prasad, J.,

(s) *Raj Comar Lal v. Bissieur* 10 Cal. 688 ; *Asitu v. Nirota Mohan* 20 C. W. N. 901, 35 I. C. 127, 1917 Cal. 292 on appeal in 47 I. A. 140, 145, 24 C. W. N. 794, 1920 P. O. 139 (point not touched); *Bishwanath v. Shorashibala* 48 Cal. 926, 25 C. W. N. 639, 66 I. C. 590 ; *Bhola Nath v. Emperor* 51 Cal. 488, 1924 Cal. 616, 81 I. C. 709.

(a) *Rajendra v. Gopal* supra.

(b) Vishnu Dharma Sutra (Max Muller Sloka 3 p. 36, Introduction and p. 46

S. B. E.); Yajnavalkya Smriti (Aprarka p. 241) ; Narad Smriti (Dr. Jolly p. 6 and Agni Purana Adhyaya 4), Vrihaspati Smriti ; Vyas (In Viramittodaya). (c) Vijnaneswar's Mitakshara while commenting Yajnavalkya Smriti Acharadhyaya Sloka 335 ; Aprarka commenting on Yajnavalkya Smriti. (d) 2nd Edition by Kali Prasad Srivastava, Yakil, Lucknow (In Urdu).

(e) 1927 Pat. 145, 150, 8 P. L. T. 34, 6 Pat. 506, 106 I. C. 620.

has very elaborately discussed this topic and his learned judgment is very illuminating, so it is quoted below in *extenso* :

“The Smritis of the Rishis, such as, Manu, Vajnavalkya, Vyas, Vasistha, *etc.*, have divided mankind into four castes; Brahman, Kshatriya, Vaishya and Shudra. Manu in Chapter X, Sloka 4, says that there is no fifth caste. Therefore, the Kayasthas, have to be located in one of these four castes. The Mahabharata asserts that at first there was no distinction of classes, but that these have subsequently arisen out of differences of character and occupation.

According to Dr. Muir (a), ‘The members of every political society are divisible into four classes corresponding to the four castes of the Hindus. These distinguished by intellectuality, learning and religion are the real leaders of the society; next in importance are the royal class, the warriors on whom the protection and the very existence of the State depends and who are characterized by physical agility, courage, administrative capacity and intelligence.’ Then come those concerned in production of wealth by agriculture and cattle breeding or cattle tending, requiring intelligence and a lower standard of morality. And *lastly* the labourers serving the preceding three classes or practising the mechanical or other similar arts, distinguished by their capacity for physical labour and spirit of dependence. The virtues and qualities requisite for distinction in these occupations as well as their importance to society are taken into consideration for fixing the relative rank of the four classes; and the common story of their origin is nothing more than an allegory representing society and different classes of its members, as one human body and its limbs respectively. The fact that there are as many castes as there are occupations proves the origin of the institution.’

Dr. Muir gives a similar explanation of the mixed classes mentioned in the Smritis. According to him the origin of the mixed classes by inter-marriage between the four tribes is imaginary and allegorical.

He says: ‘Where the abstract qualities of any two of the four tribes were thought requisite for filling a particular occupation, persons following that occupation were supposed to be descended from the offspring of an inter-marriage of a man belonging to one tribe, with a woman appertaining to the other.’

“He illustrates this by referring to Ambasthas or the physician class of Bengal who combine in themselves the culture and learning of Brahmanas and the commercial instincts of Vaishyas. The higher instinct is supposed to be derived from the superior class represented in the Smritis as the father and the lower instinct from the lower order represented by the mother.

Thus he says: ‘The principle of heredity underlies the system and gained considerable support from the state of early society.’

“The scientific way of dividing the members of a society according to character and occupation laid down by Dr. Muir has been

expressed in the form of allegory by the Dharma Sastras of Manu and other Rishis. It is sufficient to refer to Manu for all the Smritis and Puranas agree therein.

"Manu says that for the furtherance of the good of the world the God *Brahma* created Brahmana, Kshatriya, Vaishya, and Shudra from his mouth, arms, thighs and legs according to the relative sacredness of these parts of the body.

"The Brahmana was produced from the mouth for the reason of being the repository of Vedas, the ruler of all the creation and one who lays down the duties of all the social orders; the Kshatriya from the arms for the protection of the subjects; the Vaishya from the thighs or loins for the purpose of production of wealth by agriculture, trade, *etc.*, and Shudra from the legs for the service of the three classes (*b*).

"Manu then deals with the mixed classes by inter-marriage between the four castes according to the occupation requiring mixed qualifications of the principal four castes and lays down rules for the vocation of them among the four classes according to their heredity. The general principle is that the offspring of an inter-marriage between two castes is lower than the caste of his father and higher than that of the mother. His caste is that of his father though inferior in rank due to the mother being of a lower order. When none of these applies, Manu would have the class determined in accordance with the occupation, act or conduct of the party. The names of castes and sub-castes etymologically denote the occupations of the various castes and sub-castes. The origin of a caste is attributed to a particular limb of the God *Brahma* to mark the distinctive occupation and status of that caste in society. In this all the Smritis of Manu and others as well as Dr. Muir agree. These allegories and legends as to the origin of particular castes are important to show the character and occupation which originally were attributed to them, the social position, the physical and mental capacity which they were originally supposed to possess and the light in which they were regarded by other castes. Therefore, they afford very important tests for determining the caste of a particular community. I would briefly refer to them in connexion with the Kayasthas whose caste we have to determine.

"According to the Hindus the souls of men after death receive rewards and punishments according to their sins and virtues and hence it is believed that good and bad deeds of men are not destroyed, souls of men after death go to *Yamapuri* which is presided over by the deities called *Yamas* who keep records of men's actions and accordingly

(b) Manu Chapter I, Sloka 31 and 38 to 42.

give them their dues. The principal Yama is called *Yamaraja* or *Dharmaraja*, that is, the ruler of Yamapuri or the king of laws.

"The Yama Samhita which is an extract from the ninth chapter of *Ahilya Kamudheem*, a work of Hindu Law, says that Dharmaraja complained to Brahma about his difficulties in performing his most responsible duties of keeping records of the deeds of men and doing justice to them. Brahma went into meditation. Chitrugupta sprang from his body and stood before him bearing an inkpot and a pen.

The god Brahma (Creator) said: 'Because you are sprung from my body *kaya*, therefore you shall be called *Kayastha*, and as you existed in my body unseen I give you the name of Chitrugupta.'

"He then assumed charge of Yamapuri. Dhama Sharma married his daughter Irawati to Chitrugupta and Mannji, son of Surya (the sun) married his daughter Sudakhina to him. Chitrugupta had eight sons from the former and four from the latter and these twelve sons became the progenitors of the twelve sub-divisions of the Chitruguptavansi Kayastha, namely *Mathur*, *Gaur*, *Nigam*, *Asthana*, *Kulshrestha*, *Surajadhwoja*, *Balmika*, *Bhatnagar*, *Srivastava*, *Saksena*, and *Karna*.

"In Padma Purana, Uttar Khanda says that Chitrugupta had twelve sons by two wives. They were all invested with the sacred thread and married to Nagakanyas. They were the ancestors of the twelve sub-divisions of the Kayasthas. The story also says that the Kayasthas are Chitravansi Kshatriyas and never Shindras. They are entitled to all the Samskaras. The same legend with some slight difference, is given in most of the Puranas.

Padma Purana after stating the legend says, 'Chitrugupta was placed near Dharmaraja to register the good and evil actions of all sentient beings: he was possessed of supernatural wisdom and became the partaker of sacrifice offered to the gods and fire. It is for this reason that twiceborn always give him oblations from their food. As he sprang from the body, of Brahma he was called Kayastha of numerous gotras on the face of the earth (o).'

"In Shrishti Khanda the same Purana says that the sacrificial rites and study of the Kayasthas should be like the Dwijas and their occupation like that of the Kshatriyas.

"Bhavishya Purana states that God, the Creator, gave the name and duties of Chitrugupta as follows:—

'Because you have sprung from my body, therefore you shall be called Kayastha and shall be famous in the world by the name of Chitrugupta. Oh my son, let your residence be always in the region of the god of justice for the purpose of

(d), Vide W. Crooke's Tribes and Castes North-Western Provinces and Oudh 1896 Edition, Vol. 8, pp. 184-213, - - -

determining the merits and demerits of men and receiving my irrevocable order; you should observe the Dharmas, law and usages of the Kshatriya tribe according to Shastras.'

"Vigyana Tantra says the same thing, adding that the descendants of Chitrugupta are Kshatriyas by caste, and not Shudras by any means.

"The same is the enjoinder of Brahma to Chitrugupta according to Brihat Brahma Khanda quoted by Kamalakari Bhattacharya. He was named Kayastha Kshatriya having sprung from the body (*kaya*) of Brahma. He was directed to perform the Samskaras of Kshatriyas, to marry Kshatriya girls and to have writing as his profession.

"The story of Chandraseni Kayasthas as having descended from Chandra Sen, a Kshatriya Raja, is well known and has been reported in the Puranas and also in the modern treatises on tribes such as of Sherrings, [Volume II, Chapter II, page 181, 1879 Edition] and Steele's Laws and customs of Hindu castes in the Deccan Province, [page 94, 1868 Edition], [For a detailed account *vide* Skanda Purana Renuka-mahatmya] On account of contest between the Brahmins and the Kshatriyas with respect to their relative rank in society a fierce war broke out between them in which Parasuram, the Brahmanic hero, is said to have twenty one times extirpated the Kshatriya race (Sitkar's Hindu Law of Adoption). His father was killed by a Kshatriya Raja; he pursued in his thirst of Kshatriya blood the pregnant wife of Chandra Sen into the hermitage of Dalabhya Rishi. The child in the womb was saved through the entreaties of the Rishi, who when born was called the Kayastha and though deprived of the martial profession was directed to carry on the profession of reading and writing which appertained to the Kshatriyas. He was attached to the court of Kings, initiated into the Samskaras of the Kshatriyas and was taught Vedas. His descendants are the Kshatriyas in the Deccan and are known as Parbhu Kayasthas.

"Skanda Purana in another place as quoted in Vachaspathya (page 2943) gives an account of the Raja Chitra also called Vivasvan, Aditya or Mitra, the blessed and purest, having performed for long time *Tapasya* (austerities) obtained from god Siva the boon of becoming *sarvagya* (omniscient), possessed of divine intellect and supernatural powers, Dharmaraja finding his duties of keeping records of the deeds of men, doing justice according to their merits and demerits too onerous, managed to remove Raja Chitra to Dharmapuri to assist him in his duties. Chitra having thus disappeared from the mortal world was called Chitrugupta. He became one of the fourteen Yamrajases or ruler of Yampuri [Daksh Smriti].

"Garuda Purana describes imperial throne of Chitrugupta in the

Yamapuri holding his Court and dispensing justice according to the deeds of men and maintaining record, in the following words :

धर्मराजश्चित्रगुप्तः श्रवणो भास्कराक्षयः ।

कायस्थे तत्र पश्यन्ति पापं पुण्यं च सर्वशः ॥

(There Dharmaraja, Chitraraj, Sravana and others see all sins and virtues which remain concealed in the bodies of men).

Yama Samhita quoted in Shabdakalpadrūma says :

ब्रह्मकायसमुद्भूतो कायस्थो ब्रह्मसंज्ञकः ।

कलौ हि क्षत्रियस्तस्य जपयज्ञेषु राजसम् ।

"The Kayasthas have sprung from the *kaya* or body of Brahma. They are similar in rank to Brahmanas but in Kaliyuga their religious observances and duties have been prescribed to be those of Kshatriyas. Brahma himself is said to have ordained them to perform the duties of Kshatriyas. Similarly, Apastamba Shukla of the Veda quoted in Shabda-Kalpadrūma, 2nd part page 228, Shabda 20, under Kshatriya states Kayasthas as Kshatriyas. Chitraraj who reigns in heaven and his son Chaitrarath, who was light of the family, meritorious and of illustrious deeds ruled on earth for a long time as king of Chitrakoot near Allahabad."

"Meru Tantra, quoted in Shabda-Kalpadrūma under the word Kshatriya supports the same view.

"The Mahabharata (Anusasan Parva Chapter 130) recites the teaching of Chitraraj requiring men to do virtuous and charitable acts and performing Yajna, saying that men are rewarded or punished according to their good or bad deeds.

"These allegorical descriptions of the origin of Chitraraj and the Kayasthas having sprung from God Brahma in meditation and, as Risley puts it, from his inner consciousness for the purpose of managing the business affairs, performing literary work, administering justice, punishing and rewarding the deeds of mortal and keeping records thereof, indicate the status and position of the Kayasthas in society and their occupation as appertaining to the three higher or regenerate classes and that they could not be classed as Shudras whose origin is said to be from the lowest part of Brahma indicative of the servile duties requiring absolutely no mental activity.

"The name Kayasthas etymologically denotes the occupation and social position of the Kayasthas. According to Shabda-Kalpadrūma, a dictionary of high authority, and Brihat Bidhan Kayastha is defined as (काय + स्थः कायेषु तिष्ठतीति = कायेषु सर्वभूतशरीरेषु अन्तर्गामी यथा तिष्ठतीति

that is, one who lives in the body of everybody and thus comes to know of the inner life of man, that is, their deeds and misdeeds, merits and demerits. The word "Chitra" चित्र is defined by Shahila-Kalpadrūm as follows :—चित्रयते पापपुण्यविचारा चित्रिकेति लिखतीत्यर्थः यमाविशेषः etc., one who pictures, records and considers the sins and virtues of men and who is one of the Yamas so as to give the mortals their dues after death. Turning to the Smritis, Vishnu in Chapter VII, verse 3, says that a document attested by the king is one which is written or prepared by a Kayastha, an Officer of the Court appointed by the king, and stamped with the fingerprints of the head of the department. The words are (राजाधिकरणे तानियुक्त कायस्थकृततदध्यक्षकर चिन्हित राजसाक्षिकम्). Virūhat Prasara in Chapter X, Sloka 10 says : लेखकानपि कायस्थान् लेखकृत्यद्वितैषिणः Kayasthas should be appointed as writers being expert in the art of writing. " Again in Chapter 1, Sloka 225 he says that *Danda dhritā* दण्डधृत the Magistrates and Judges of the Courts should be (*dharma-gya*) persons versed in laws and good administration, Kayasthas who are versed in the art of writing लेखकानपि कायस्थान्. Similarly, Shukraniti in Chapter XXXII Sloka 420 describes Kayasthas as Lekhaks कायस्थो लेखकस्तथा, and in Chapter II, verse 178 says that the accountant and *lekhak* knew the Vedas, Smritis and Puranas.

Bṛihaspati quoted in Prasara Madhava and Vyas cited in Vajjayanti says that, 'A *lekhak* and *Ganak* (writer and accountant) must be a person who has command over languages (literally who knows particulars about words), is pure in mind (mind and body), has control over his temper, is not covetous, is truthful and can write clearly and in a lucid style.

"Vyas says that the writer and the accountant should be श्रुताध्ययनसम्पन्न that is, versed in Mimamsa (*Śrutis*) and Vedas (*adhyayana*) as explained by Mitakshara 'in commenting upon Yajñavalkya, Chapter II, Sloka 2, which says that the king's councillors should be versed in the sacred books of Mimamsa and Vedas, expert in law, truthful and impartial.

"Yajñavalkya in Slokas 317 to 320 describes how the edicts of the king should be written, sealed and promulgated. Aparāika in his commentary upon these slokas quotes from Vyas and shows that these edicts should be written by *Lekhaks*, the ministers of war and peace (*sandhi vighraha kari*), and that they should be promulgated to the gentry and officials among whom Kayasthas have been mentioned. Similarly, Vijnāneswara, in his Mitakshara commenting these slokas, says :

'He (king) should cause it to be recorded by that officer of his who is in charge of war and peace (i.e., by a Kayastha), and not by anybody else. As says a Smṛiti :

'That officer of his who is *sandi nigraha kari* or the officer-in-charge of peace and war should be its writer (*Lekhaka*).'

"Yajñavalkya uses the word 'Kayastha' in Slokas 335-36, Chapter I. Commenting upon this Mitakshara says that Kayasthas are accountants and writers कायस्था गणका लेखकाश्च. He makes the word 'Kayasthas' synonymous with accountants and writers. Similarly, Apararka says that Kayasthas were revenue-collectors (*Kar-adhikrita*),

"The author of the Viramitrodaya makes the following comment on the text of Vyasa already quoted and proves that the Kayasthas are the twice-born class.

The accountant must be twice-born, because it is declared that he should be a person who has studied the Vedas which none but a twice-born can do; so also the writer must be twice-born, because they go together.

"The accountants and scribe constitute one of the ten parts of a judicial proceeding (c). Brihaspati says the same thing, as quoted in Prasara Madhava and Vyavahara Kanda.

"Yajñavalkya in Sloka 335 (numbered 334 and 336 in some books) enjoins the king to protect his subjects from the oppression of the Kayasthas especially. Mitakshara gives the reason that they being the favourites of the king (*Rajvallabha*) and officers of the court as Ministers of War and Peace, Councillors, writers and accountants are more likely to take advantage of their position and oppress the subjects. This view is in accordance with Manu who in Chapter VII verse 123 says, that the king's servants connected with the government of the realm may become exacting and deceitful and the king should protect his subjects from such officials.

"According to the Smritis, the officers of the realm, such as, ministers of peace and war, courtesans and councillors; governors and headmen of villages should be men versed in the Sastras, valorous and born of noble family, pure, intelligent, affluent in wealth and of tested virtue and comprehension (d).

"The officers of the Court must be twice-born who are preferable to Shudras even if they are by name twice-born. A Shudra, the Smritis say, should in no circumstance be associated with the court (e).

The realm of a king where-in a Shudra official administers justice is destroyed under his very eyes like a cow merged in the mire (f).

"Thus, according to the Smritis and the commentaries thereon, notably of Apararka, Vijnaneshwara called the Mitakshara and

(c) Jolly's Translation of Narada p. 6, (e) Manu, Chapter VIII, Verse 20; Vyasa, S. 16. Chapter I, Verse 6; Vasistha, Chapter

(d) Manu, Chapter VII, Verses 54 to 121; XVI.

Yajñavalkya, Chapter I. Verse 312.

(f) Manu, Verse 21, Chapter VIII,

Viramitrodaya, the recognized authorities in the Benares School, the Kayasthas were Officers of the Court, Ministers of War and Peace, writers and accountants and were required to study the sacred Vedas and the Dharma Sastras. Had they been Shudras, they would not have been allowed these privileges which appertain exclusively to the regenerate classes. By origin the Kayasthas were of pure regenerate descent. Even if they be of mixed origin, as some say, they cannot be Shudras.

"W Crooke of the Bengal Civil Service in his book on the Tribes and Castes of the North-Western Provinces and Oudh, Volume III, pages 184 to 213, deals with the Kayasthas. He gives the Puranic legends of their original growth already referred to. Their common ancestor was Chitrageeta. He had twelve sons: Bhanoo, Vibhanu, Vishwabhanu, Virjawan, Charu, Sucharu, Chitra, Matiman, Himavan, Chitracharu, Arun and Atindriya. The twelve sub-castes of Kayasthas have descended from these twelve sons: Srivastava from Bhanoo, Surajdhawa from Vibhanu, Asthana from Vishwabhanu, Balmiki from Virjawan, Mathur from Charu, Gaur from Sucharu, Bhatnagar from Chitra, Saksena from Matiman, Ambastha from Himavan, Nigam from Chitracharu, Karan from Arun, and Kulsrestha from Atindriya. Bhanoo, the ancestor of Srivastava, immigrated to Kashmere where he became Raja of Srinagar and obtained the title of Rajadhiraja from Chandragupta, the Raja of Magadhi (South Bihar). Bibhanu, the ancestor of Surajdhawaja, obtained this title from Sursena of the Ikshwaku race because he helped him in performing a sacrifice. Vishwabhanu the ancestors of Asthana, was honoured by the Raja of Benares and he presented to him *astha* or eight kinds of precious pearls and hence he was called Asthana. Virajawan, the ancestor of Balmiki, gained the name of Balmiki on account of his austerities and devout meditation in god. Mathurs, the descendants of Charu are so called on account of their having settled at Mathura. The Gaur Kayasthas, descendants of Sucharu, are so called from Gaur or Gauda, the old capital of Bengal. The Sena dynasty was founded by this sub-caste; their ancestor Bhagadutta is said to have fought in the war of Mahabharata on the side of Duryodhana against Yudhishtira. Raja Lalasena was another famous king among them. The last of that dynasty was Raja Lakshmana. Bakhtiar Khilji deposed the Gaur Kayastha dynasty. The Bhatnagar sub-caste derives the name from the residence on the bank of the Bhat river or the old town of Bhatner, the fort of which is of some historical interest having been at various times captured by Mahmud of Ghazni, Taimur and Kamran, son of Humayun. The Saksena sub-caste, literally

'friend of the army' was given this title by the Srivastava Raja of Srinagar on account of their skill in war. One of their ancestors *Surajchandra* or *Somadutta* obtained the title of Kharva as a recognition of his honesty as treasurer to Kusa, one of the twin sons of Rama and Sita, hence the Kharva sect of Saksena sub-caste.

"The other section called Dusra is named because one of them accompanied Humayun, father of Emperor Akbar, during his refuge in Iran after his defeat by Sher Shah. Ambasthas are so called because of their worship of the goddess Ambaji. They have settled at Ginnarhill. They are versed in the art of surgery, and there is a colony known as Kothar at Nagram in the Lucknow district, who have a great local repute. The Ambastha subject is also to be found in the Gaya and Patna districts of Bihar. There is a class called Ambastha who are Vaidyas or physicians in Bengal. In the Sruti already referred to (Manu X, 8) Ambastha is mentioned as descended from Brahmana and Vaishya woman. Some say that refers to the Ambastha Kayasthas of Bengal. Even then according to Manu, they would be inferior to Brahmana and superior to Vaishya. They will take the caste of their father though of an inferior order; but really the Ambastha referred to in the Smriti is not to be confounded with the Ambastha sub-caste of the Kayasthas who are descendents of Chitrageeta through his son Himavan.

"The Karan sub-caste, the descendants of Arun, says Mr. Crooke, 'is a purely Aryan sub-caste and they traditionally take their name from Karnali on the Narbada. It applies to the indigenous writer class in Orissa called Karan of whom a full account is given by Mr. Risley.'

"According to the account given by Mr. Crooke of the different sub-castes of Kayastha they seem to have played a very important part in history. They founded dynasties, became Rajas and Rajadhirajs, fought on the battle fields, displayed skill in war and were honoured by the kings and the people and occupied a high place in society. Their religious ceremonies were performed according to the rules prescribed for the higher classes. As to marriage, Mr. Crooke says :—

"The Kayasthas follow the highest form of the eight kinds of marriage recognized by Manu in his Institutes, known as *Brahma*. The ceremony is performed according to the rites laid down in the Sanskrit treatise known as the *Vivah Paddhati*, with the Vedic formulae (*Mantras*) as in the case of Brahmanas and the other twice-born classes. The essential and binding portions of the ceremony are the *Kanyadana* or the giving of the girl by her father, the *Panigrahana* or taking of the bride's hand by the bridegroom, *Saptapadi* or sevenfold circumambulation of the sacred fire by the pair, and the *Sindurdana*

or application of red powder by the bridegroom to the parting of the hair of the bride. As a rule too every Kayastha bridegroom must be invested with sacred thread before or at the time of marriage.

"The marriage among them is forbidden between sapindas, that is, who are within five degrees of affinity on the side of the mother and seven degrees on the side of the father. No marriage can take place between persons belonging to the same *al* nor can a man marry a woman belonging to the *al* of his maternal grandfather or great-grand-father. Polyandry is strictly prohibited and polygamy though allowed is rarely resorted to, even though the first wife is barren. Re-marriage of widows is absolutely prohibited. They worship Chitrugupta particularly on the second day of the bright fortnight of the month of Kartik known as *Yama Dvitiya* which is a day for worship for all the Hindus, Chitrugupta being one of the fourteen Yamas. The other deities are the same as those of the other Hindu castes".

It is, therefore, submitted that in view of the sound reasonings, the history of the case and the unanimous opinion of the authorities, old or new, there is no room for any doubt for not treating the Kayasthas as belonging to the *Kshatriya varna*. In the absence of any Privy Council opinion or the contrary opinion of any authority the contrary view of the Calcutta High Court cannot be of much weight and in face of the learned and well-considered judgment of Sir Jwala Prasad, J., as given above, the contrary view is not tenable.

Sucharu is the common ancestor of the Kayasthas of Bengal. **Kayasthas in Bengal.** The King of Kanya Kubja (Kanauj) at the request of Adisura, the King of Bengal, sent him five learned Brahmanas to officiate at a sacrifice. Five Kayasthas namely, Makaranda Ghosh, Dasharatha Basu, Kalidas Mitra, Dasharatha Guha and Purushottama Datta also came with the Brahmanas and settled in Bengal. Their descendants by intermarriage with the other Kayasthas constitute the Kayasthas of Bengal. The Kayasthas of Bengal have lowered themselves down in social scale and have fallen to the status of Shudras as they do not perform the *Upanayana* ceremony (the investiture with the sacred thread) and observe one month's mourning like the Shudras. They add to their names title of *Dasa*, peculiar to *Shudras*. But the non-observance of the religious duties required of a member of a particular caste does not degrade him to lower grade or to the grade of the Shudras and the present rule of law is that the caste depends on heredity. The primitive principle that the caste of a person did not depend on heredity but on the occupation and the possession of characteristic merits (Manu I. 168), has not become obsolete by lapse of time and circumstances. In all respects

the Kayasthas observe the rules enjoined on the Kshatriyas and they cannot be an exception to the general rule of heredity as regards castes. So they are to be regarded as Kshatriyas like Kayasthas of other provinces in India.

Besides the rules of the Kshatriya enjoined on the Kayasthas, the occupations and offices enjoyed by them from very early times may also help to indicate Varna. They held various high appointments and offices which no one but the regenerate classes ever held from times immemorial up to the present day. They were responsible officers of the Court (a); executive heads who had to keep accounts and to discharge the duties of writing important documents. Owing to the fact of their being the recipients of special favours from the kings by virtue of their special merits and talents, they not only became exceedingly popular and famous, but also the object of malice and envy to those whom they had superceded in position, rank and wealth (b). They held posts of Revenue Officers (c) and judgment writers (d). They were not mere copyists; they were efficient in accounts, and knew several languages and dialects (e). It was ordained that the accountant who was a Kayastha must have studied the Srutis besides possessing other good qualities (f). As regards the qualities of a writer Vyasa says: "He must be a person who has command over language, is pure (in mind and body), has control over his temper, is not covetous, is truthful and can write clearly and in lucid style" (g). They who knew the Vedas, the Smritis and the Purana, were declared to be aware of what was heard from God (h). Thus it would be preposterous to suggest that the Kayasthas who were writers and accountants and enjoyed all the rights and privileges of the regenerate classes were not Kshatriyas or did not belong to the twice-born classes. The authority of Viramitrodaya that has correctly commented on the text of Vyasa cannot be questioned in any way and it establishes that the Kayasthas are a twice-born class: "The accountant must be twice-born because it is declared that he should be a person who has studied the Vedas (which none but a twice-born can do); so also, the writer

(a) Vishnu Smriti VII, 1—3; *Mrit Saka-* Yajñavalkya Smṛiti.

ikam, a drama composed about 2000 years ago, describes the trial of a suit in which Kayastha's duties are described as those of the pleader of both parties, and also of the Bonoh clerk. (c) Apararka on Yajñavalkya's text on Kayasthas.

(d) Code of Brihat Prusara X, 10.

(e) Sukra Niti II, 173.

(f) Vyasa's text cited in Vaijayanti, a commentary on Vishnu's Institute.

(b) Yajñavalkya Smṛiti I, 336; Mitakshara on the above text, Sulapani in (g) Vyasa cited in Viramitrodaya.

his Yajñavalkya Dipakalika on (h) Sukra Niti, II, 178.

also must be twice-born, they go together." Therefore, it is established beyond any shadow of doubt that the Kayasthas are Kshatriyas belonging to the twice-born class.

The Sastras enjoin the forfeiture of all civil rights with the deprivation of caste; commission of certain offences involves degradation and its extent depends on the gravity or enormity of the misconduct of the defaulter (r). But the Caste Disabilities Removal Act XXI of 1850 has repealed all such texts and usages and its effect is that the forfeiture of one's caste now does not entail any of its prescribed civil liabilities and though he may be expelled from the caste by the caste people his right to his property remains intact.

The tests to know whether a person belongs to the regenerate class are: (1) the consciousness of the caste, (2) its customs and (3) the acceptance of that consciousness by other castes (j). The burden of proving that a person belongs to a particular caste is on the claimant (k).

SECTION 10. COMPARISON OF MANU AND YAJNAVALKYA SMRITIS

The Manava Dharma-sastra, commonly called the *Code of Manu*, is the most ancient code of law still in force (l). Professor Max Muller (m) for the first time propounded the theory that Hindu Law grew and developed in *Vedic Charanas* or *Schools* on the analogy of the *Dharmasutra* of the *Apastamba* school. Dr. Bühler (n) supported and gave prominence to this theory by his treatment of the extant Dharmasutras that were recited by Brahmins who adhered to the old Vedic learning of their particular *Sakhas* and could repeat them from memory with the ritualistic sutras of their traditional schools. Professor Jolly of Germany (o) further supported this theory. Professor K. P. Jayaswal gave a death

- (l) *Neelawa v. Gursheeddappa* 1937 Bom. 169, 39 Bom. L. R. 211; K. L. Sarkar's *Adoption* p. 203, 2nd Ed.; *Somaria v. Bhularya* 54 I. O. 820 (Pat.); *Ma Yait v. Maung Chit* 42 M. L. J. 193 (P. O.) reversing 10 Bur. L. T. 194, 37 I. O. 780.
(j) *Kalappa v. Shivappa* 1938 Bom. 132, 39 Bom. L. R. 1282.
(k) *Jiji Bai v. Zabu* 30 N. L. R. 78, 1933 Nag. 274.
(l) In the administration of Hindu Law, Manu's law of marriage, sonship,

guardianship, debt, interest, partition, succession, gifts, etc., are referred to to-day as of the first rate importance, whenever it is necessary to resort to first principles in order to ascertain the law. Cf. *Ramalakshmi Ammal v. Sivananthu Perumal Sethuraya* 14 M. I. A. 570.

(m) *History Skt. Lit.* pp. 68-69.

(n) S. B. E. Vol. XXV pp. XVIII-XLV Vol. II, Pt. I, pp. xi-xiii.

(o) S. B. E. Vol. VII, pp. x, xx-xxii,

blow to this theory and held that **Artha-sastra of Kautilya** was the real source of Hindu Law (p). This revealed code of law proper, purely secular, had the express provision that the *royal law* could supersede the *dharma law*. Both Manava Dharma Sastra and the Code of Yajnavalkya were shown to contain the principles of the Artha sastra. The *Code of Narada* which is regarded as the first Hindu Code of pure law turned out to be largely based on the Artha-sastra. The date of Artha-sastra is admitted by historians to be the period of Chandragupta and Kautilya (q). The bold 'Dharmasthiyam' or the Code for the 'Royal Judges' of the Artha-sastra dealing with purely secular laws is anterior to the Code of the Manava and Yajnavalkya Dharmas. The period of the Hindu secular Codes of Law may therefore be traced back to the fourth century B. C. and the Municipal Law to a much earlier date. The Dharma-sastra literature corroborates this view. It knows and recognises the authority of the Artha-sastras. Apastamba's Dharma sutra is pre-Paninian in its language and oldest in form. Vyavahara laws included secular and Municipal Laws. The Dharma law has its origin in the Vedic lore and the Vyavahara has its origin in political governance and the king; that governance is a sacred act, being ordained by the Creator; its laws (Vyavahara law) consequently are sacred :

भर्तृप्रत्यय उत्पन्नोव्यवहारस्तथाविधः । (५०)

उक्तोयश्चापि दण्डोऽसौ भर्तृप्रत्यय-तत्त्वः

ज्ञेयो नः स नरेन्द्रस्थो दण्डः प्रत्यय एव च ॥ (५२)

Kautilya says that *Dharma*, *Vyavahara*, *Customs* and *Royal ordinances* are the four legs of law suits, that the latter in each case may supersede the former.

धर्मश्च व्यवहारश्च चरित्रं राजशासनम् ।

विवादार्थश्चतुष्पादः पश्चिमः पूर्वबाधकः ॥

"The secular laws or king's laws in the sutra period were different from the Dharma law. They were to be found in an independent class of literature—the Artha-sastras. The Dharma-law, though it greatly influenced the municipal law, cannot be treated as the real or main origin of Hindu Law. The provinces of Dharma and Artha were separate. In secular matters the authority of the latter and the kingly enactments were the only binding authority. But in the Manava-dharma-sastra, for the first time, we find the Dharma-sastra invading

(p) 15 O. W. N. colxxiv, cccx (290), cccix | (q) K.P. Jayaswal; *Hindu Polity* pp. 203-
(299) See also 16 O. W. N. clxx (170). | 14 ; *Manu and Yajnavalkya* p. 2,

upon and appropriating the province of the Artha law and making the latter only an appendage to its own system. The reason was that the sacerdotal power had become also the political power in the country. The law of the politician, therefore, got merged into the law of the sacerdotalist. This invasion of the law proper by the Dharma-sastra explains the sudden appearance of a fully developed system of law in the Dharma literature in the shape of the Manava Code. The portions of the Dharmasutras which former scholars treated as law proper, but which are not so, cover only three or four pages in print: whole Manu's Code gives 782 out of its 2684 verses to the king and the law to be administered by him. It divides the legal subjects in eighteen 'Titles.' The 'Eighteen Titles' are really the eighteen titles of Kautilya's 'Code for Judges,' with slight modifications. In ignorance of these circumstances Buhler tried in vain to explain the origin of the Manava Code by reference to a hypothetical 'Manava-dharma-sutra' (m)."

Dharma-sutras had been in existence long before Kautilya and Apastamba. Panini gives a special rule for the Dharma-books according to which the Vedic charanas or schools had their Dharma books which were called after their names, such as, the Kathaka, Kalapaka, Mandaka, Palppaladaka and the Atharvana (Atharva-vedic) Dharma. Before the time of Patanjali text-books independent of Vedic schools had been, in existence in sutra-style; for example, Gautama's Sutra and Vasistha's Sutra. The Purana was drawn up very often by the Dharma-sutra-kars. Several principles of purely equitable nature were borrowed from the Purana by the Dharma-sutra-kars, who regarded it with respect and as a source of *Dharma*. Such was the condition of the Dharma literature when the Manava Code made its appearance. This briefly gives the history of Hindu Law before the appearance of Manava Code.

The chief feature of the code is that it is attributed to the primeval Manu, Manu *Svayambhuva*, son of Svayambhuva or the creator. If this claim is made, the existence of two Manava-dharma-sastras becomes inconsistent. The mention of the Dharma-sastra in Vatsyayana's Kama-sutra, a work of about the third century A. D. (n), has been made in this Code. Mahabharata and other works relate that Prajapati or the Creator composed a huge work (called *Dandaniti*) in 100,000 chapters for the conduct of the society respecting the three divisions of life, the Dharma, Artha and Kama (o) प्रजापतिर्हि प्रजाः सृष्ट्वा तासां स्थितिं निबन्धनं त्रिवर्गस्य साधनमव्यायानं शतसहस्रेण प्रोवाच ।

(m) K. P. Jayaswal—Manu and Yajna-
valkyu, 17-18.

(n) Chakradar, Studies in the Kamasutra,

J.B. O. R. S. Vol. 1919 p. 205.

(o) Kamasutra, Chowkhamba Sanskrit
Series p. 4 : Kamasutra p. 4,

Vatsyayana says that Manu Svayambhuva separated from this encyclopaedia of Prajapati the portion on dharma (*p*). The fact of the alleged plagiarism by Manu Svayambhuva establishes its existence in the time of Vatsyayana which is about 200 A. D. The quotations by Asvaghosha (*Vajrasuchi*) from the Manava-Dharma Sastra for the purpose of criticising the caste system also establish the age of Manava-Dharma-Sastra before the second century A. D., and also prove that no part of the Manava-Dharma was in sutra. Asvaghosha's time being definite, its existence before 100 A. D. becomes evident. As some time must have elapsed before the code assumed the recognised authority, its latest date would be about the first century B. C. or the beginning of the first century A. D.

K. P. Jayaswal (p. 26) says :

"Its earliest date cannot go beyond the time of the Parthians who along with the Paundras, Chodas, Yavanas, Sakas and others are described in the Code (X. 43—44) as excluded by the Hindus on account of their non-adherence to Hindu rites and Brahmanas (*q*). The Parthian kingdom was founded by Arsakes. Patanjali wrote very near 188 B. C.

The Parthians come on the scene, according to history, two decades later. The highest ago-limit of the Code, therefore, would be after the Mahabhashya, say after 188-170 B. C. The Mahabhashya does not cite the authority of the Manava-dharma-sastra but knows only 'Dharma-sutrakars'. Thus the code would appear to have been composed within the 170 years of the pre-christ period. This was the period of Brahminical revival and actual Brahmin political rule in India. Sungas and their successors Kanvayanas were Brahmins. The definition of Hindu India (*Aryavarta*) given in Manu's code shows that it is referable to the early part of this period. The Surasena country would not have been counted amongst the pre-eminent Arya countries if it had already passed under the Mlechchha Satraps. The code, consequently has to be assigned a period after the Maha-Bhashya but not much later than 150 B. C., say between 150 B. C. and 120 B. C. At the same time it precedes the Mahabharata (*r*).

Manu, the giver of the legal code, must be distinguished from other Manus of Sanskrit literature. Kautilya was drawing upon Artha-sastras and one of his authorities was a work of a school of politicians called the school of the Manavas (*s*). Therefore, the existence of a Manava Artha-Sastra or Manava Raja-Sastra is

(p) M. B. H. XII, 57, 7.

(q) Manu X. 43-45.

(r) K. P. Jayaswal; 'Manu and Yajna-

valkya p. 32.

(s) They may not be necessarily identical with the Vedic school of the Manavas

now beyond any reasonable doubt. Besides the references of Manava Artha-sastra in Kautilya, Mahabharata describes Manu Prachetas as one of the authors of the Raja-sastras or Politics. The Artha-sastra of the Manavas which was referable to a human Manu or a Manava-charya was likewise attributed to the son of Prachetas, to distinguish him from Manu Svayambhuva, the reputed author of the code of law.

The political treatise of the historical Manava school and our Dharma-sastra attributed to Manu must remain contradistinguished to avoid confusion. The latter should also be distinguished from the historical Manavacharya, the author of the Manava Grihya-Sutra, from whom a school of the Krishna Yajurveda, derives its name (Manava-charana). The original name of his Grihya-sutra is Brihad-dharma; it proves that there was no separate Dharma-sutra of the school written according to the tradition of that school. Jolly and Bradke who studied the Manava Grihya-sutra held that there is no affinity between it and Manu's Dharma-sastra (i). Therefore, it is clear that there is no connection between the Vedic school of Manavas and Manava Dharma-sastra.

The last Chapter of the Code (Ch. XII) reflects its political character. The hundredth verse declares, "The post of the Commander-in-Chief and the kingdom, the very headship of Government, the complete empire over every one, are deserved by the knower of the Vedic-science."

Political character of the code.

सेनापत्यं च राज्यं च दण्डनेतृत्वमेव च ।
सर्वलोकधिपत्यं च वेदशास्त्रविद्वहति ॥

By this verse as well as by verses 106-108 the Brahmins claim to become Senapatis and rulers, as *Vedavit* (knower of the Veda) means a Brahmin. Verses 261-62 of Chapter XI further declare that the Brahmin (*vipra*) who has killed even the peoples of the three worlds, is completely freed from all sins on reciting three times the Rig, Yajur or Sama-Veda with the Upanishads. The old Dharma-sutras had prohibited even the touch of a weapon to a Brahmin [Apastamba I. 10-29-6] 'A Brahmin shall not take up a weapon in his hand though he be only desirous of examining it' परीक्षार्थौऽपि ब्राह्मण आयुधं नादधीत । Gautama also expresses the same view as quoted in Bauddhayana. But this view was revised and exactly opposite provision was put by him in Ch. VII V. 6. Apastamba by a general rule and Gautama by a special one allowed an exception to the general prohibition : when in

(i) Jolly : S. B. E. Vol. vii Introduction; Von Bradke : Z. D. M. G. Vol. xxxvi, 1882 pp. 417-477.

danger of life or limb, a Brahmin may use force in self-defence. The exaggerated and new claims for the Brahmin caste, can be judged by a Brahmin only [VIII. 20]:

जतिमात्रोपजीवो वा कामं स्याद्ब्राह्मणब्रूवः ।

धर्मप्रवक्ता नृपतेर्न तु शूद्रः कथंचन ॥

And that the Brahmin is the lord of all—*Sarvasyadhi patir-hi sah*, [Manu VIII. 37] become explicable in the light of the political age when the code was promulgated.

Aggressive orthodoxy is also evident from the Code. The heretics, *i.e.*, the Buddhists, Jains, *etc.*, were to be banished from the capital and were to be regarded as bad as thieves [IX. 225-26]; no oblations were to be offered to the soul of those who had joined the ascetic orders of mixed castes and to women who had joined heretical orders [V. 89-90]. All those traditions (*Smritis*) and all those despicable systems of philosophy, which are not based on the Vedas, bring no reward after death; for they are declared to be founded on Darkness. All those doctrines which from other sources spring up and fall, are worthless and false, they being of *modern date*. [XII. 95-96] The last expression refers to modern systems of Buddhism and Jainism. Nuns were for the first time permitted by the heretical sect of the Buddhists in Hindu society. The orthodox system allowed women to go into the Vanaprastha or hermit life with their husbands, but they could not join the next higher order, *viz.*, the ascetic. Buddha not only opened up the fourth order to all caste and to both sexes but to all ages. The orthodox community and the Dharma-sastras fought against this and emphasised the duty of marrying, made it compulsory and even went to the length of extolling the married and family life as higher than all other orders. Manu's code put forth the strongest fight [VI. 34-35; 37]. The code is consistently hostile against heretical Indian Republics.

The features of the orthodox counter-revolution in the code are not limited to social matters only. The principles of law which had been in vogue in the period before the Sungas have been combated and condemned where they depart from the strict principles of the Dharma school. The Artha-sastra, for instance, provides that the king-made law overrides the Dharma law and that in the case of a conflict between the dharma-provisions and dharma-nyaya the deciding factor is *nyaya* (reason or justice): 'before Nyaya, the text must fail.'—'*Nyayastatra pramanam syat tatra patho hi nasyati.*' *Nyaya* or legal interpretation was formerly employed to explain the texts. An example occurs in

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Apastamba [II. 6-14-13], where a Vedic text has been explained away in favour of a Dharma doctrine. But Kautilya provides for a conflict between Nyaya and Dharma, and puts the latter entirely under Nyaya or Dharma-nyaya, which would openly put aside a Dharma text. Apparently, here principles of consideration of justice are implied. 'Manu', on the other hand, claims that Dharma laws coming as they do out of the Vedas and 'Dharma-sastra' (probably including the Grihya-sutras), cannot be over-ridden. To subject them to reason would be subjecting their two sources (Veda and Smriti) to the Canons of Reason (II. 10, 11) and the Brahmin who does so is to be treated as a scoffer at the Veda, and his opinion should be excluded [II. 11]. "The knowledge of the Dharma resides in those who are not given over to Artha and Kama. For those who want to make enquiry about the Dharma the authority is the Sruti. Where Sruti conflicts with another Sruti text, or with Dharma text, both are held to be law; for both are pronounced by the wise to be law (II. 13, 14);" [K. P. Jayaswal p. 41].

K. P. Jayaswal (p. 42) finally remarks,—“The Manava Code thus suffers from its political, social and sacerdotal prejudices. It is a code as well as a controversy.” Whatever the controversy may be, at the end of the first century of the Christian era Manu's Code became the Dharma-sastra and this phenomenal success and swiftness in its acceptance was due to its royal recognition. It became the approved code of the Sungan regime.

Bühler's theory that the Manava Code existed in its present form before the second century, A.D. cannot be accepted. **Revision of the Code.** K. P. Jayaswal (p. 49) says, “The major portion of the quotation as given in the Vajra-suchi of Asvaghosha, is identified in our present Manu, but verses which gave the history of questionable origins of certain Rishis and a verse in a metre other than *Anushtubh* are not to be found in our Manu; which is, as you know, exclusively in *Anushtubh*. Occasionally, different and archaic metres are found even in the Mahabharata. The original Sumati's Manu Code also had them. This is also proved by a quotation in Vasistha in *Trishtubh*, which is now found condensed into *Anushtubh* in Manu's Code. We may not attach too much importance to what Narada says about the volume of Sumati's work of 4000 Slokas, as there is a vein of exaggeration there throughout. Yet the evidence of Asvaghosha, Vasistha, and certain differences in the Mahabharata and the present-day Manava versions of the same passages compel us to come to the conclusion that changes were made at least once We, however, could not be sure that no material change was introduced,

though it does not seem to be likely. Its authoritative character from the beginning would have prevented great material changes, and there is no great evidence of such changes "

The changes must have been completed before the advent of Yajnavalkya's Code which is only in one metre—the *heroic*, and follows Manu. The language of Manu yet remains markedly of an earlier epoch. The coins and monetary systems retain their old character in Manu. The final revision and the present form may be fixed near about 100-150 A. D. but not later. If the work had been attributed to Manu in its original scheme no sutra-karas would have been mentioned. The addition of Manu's name in the preface must also be placed in the period of revision subsequent to Asva-ghosha and anterior to Vatsyayana

Let us now consider the date and character of the Code of Yajnavalkya. Like the Manava Code, it is a **Yajnavalkya Smṛiti.** Dharma-Vyavahata Code covering the whole area of the secular as well as the canonical law. Although a sharp line of demarcation was not drawn at that time between the two laws, yet Yajnavalkya made an immense advancement in this respect by making the following three divisions of his Code: (I) *Achāra*, (II) *Vyavahāra*, and (III) *Prayaschitta*. Narada and his followers Brihaspati and Katyayana made such distinction. The first and the last were in fact subjects of the Dharma-sastra. The third was introduced in the middle, as an appendix to the Achāra of the king. Yajnavalkya treats law proper as an independent subject and lays down clear-cut provisions in so many sections. He does not devote too much space to *achāra* like Manu, but gives it the same space as to Vyavahāra. The style is severe like that of the Sutra-works. Interpolations at three places on the Penances, the life of the ascetic (verses 56-66) and the anatomy of human body (verses 67-203) are apparent. The verses 1-2, 4-5, 6-7 out of the first 9 verses are clear interpolations (x). The introduction calls him Yajnavalkya, the prince of Yogins; it was his family name; the personal name of the author is lost. "The Yajnavalkya family was associated with Mithila and Videlia but it cannot be said that the Yajnavalkyas never went out of North Bihar and that they were not to be found in other parts of the country. Yajnavalkya's treatment of the Yajurveda with marked partiality [I 42], his leaning towards the Mantas of the white Yajus, and some analogies between the doctrines of Pataskara's Gṛhya Sūtra and Codes would warrant us in saying that the author belonged to the white Yajurveda and that he adhered to the Vedic school of his family. But we cannot

(u) K. P. Jayaswal—Manu and Yajnavalkya, 58.

(v) Ibid. p. 58-59.

go further and assert, as was done by Jolly and others, that the analogies prove the existence of a Dharma-sutra which was the basis of the Yajnavalkya Code. No such Dharma-sutra is mentioned anywhere. We can only say that the Code is based on (1) the Manava Code as pointed out by Stenzler, (2) the Vishnu Smṛiti, as pointed out by Jolly, and lastly, and for law proper mainly, on the Arthashastra of Kautilya (v)."

Yajnavalkya omits the treatment of Manu's prohibition of gifts from non-Kṣatriya kings and the hostility of the Mlecchas. The Mlecchas were then ruling. The scientific treatment and freedom from prejudice made this code acceptable throughout India. Vijnaneshwara and Aparāṅka selected it as the basis of their writings. Religious schools and the Rīg-Vedins gave it due recognition. It raised the position of the Śūdras by allowing them Chandrayana penance which was allowed to the twice-born. The fanatical penances of Manu were reduced to reasonable limits. The extravagant claim of the Brahmins for total immunity is set aside, and they are brought under the king's law. The profession of wielding arms was once more forbidden to them and their claim to hold the sceptre was denied. The code bears the stamp of the kingly conscience bequeathed by Buddhism during its past revolution. Punishments are much less severe. The code is an advancement not only on Manu but also upon Kautilya. Laws about women were also improved according to their social position which had been much raised by Buddhism. Their right to inherit was fully admitted. It was recognized during the early Gupta times. This code practically repealed Manu's Code throughout the land of Aryan civilisation. But at the same time Yajnavalkya retained orthodox conservatism on account of which it outlived the true codes of law like that of Nārada. It is the credit of this code that it gave a permanent tie to the Dharma-Vyavahara mixed system of law in the country.

THE END

OPINIONS :

The Hon'ble Mr. *JUSTICE J. R. D. BHAVNATH*, Judge, Chief Court writes :

" Mr. Kashi Prasad Saksena is already known to the legal profession as the author of a book on Muslim Law which has been regarded as a text-book for students by the London University. He has now produced a work on Hind Jurisprudence which would be of valuable assistance to post-graduate students of law. It constitutes an elaborate study of the origin and development of the Hindu science of law based on the original texts of the *Hindu Dharmasastra*. His work shows industry and scholarship and a keen insight into the subject."

The Hon'ble Mr. *JUSTICE P. C. AGARWAL*, Judge, Chief Court, Lucknow writes :

" Mr. Kashi Prasad Saksena's 'Muslim Law' is known to the legal world and is one of the standard works on the subject. His new book 'Hindu Law and Jurisprudence with Mimamsa Rules of Interpretation' is quite original of its kind. His masterly treatment of the subject and the pains he has taken in the discussion of the original Sanskrit texts are very commendable. The book is a boon to the legal world and I am sure that it will be useful not only to research scholars but to the bench and the bar as well."

Mr. K. S. HAJELA, M. Sc., M. A., LL. M., Advocate and Reader in Law Lucknow University, writes :

" I have gone through the advance copies of Book I and Book II of your Hindu Law; dealing with Hindu Jurisprudence and the Mimamsa Rules of Interpretation. It is a happy and indeed singular scheme that you have adopted for your prospective work on Hindu Law that along with the study of general Hindu Law you have included a thorough discussion and sound exposition of such abstruse and philosophical subjects as the *Hindu Jurisprudence and Mimamsa Rules of Interpretation*. . . . I believe that a fair acquaintance with these subjects and the original texts and digests is necessary for a thorough study of Hindu Law and a sound exposition and correct interpretation of many of its intricate principles. It is for this reason that I heartily welcome the publication of your treatises on the above subjects. I am sure they will provide sufficient stimulus for a detailed and comprehensive study of Hindu Law and the post-graduate students in law will be particularly benefited by your publications. Your books evince remarkable scholarship and industry and I trust the third book of the series which you propose to devote to general Hindu Law will be on similar lines as regards the discussion of various topics and in keeping with the standard which you have maintained in these books. You will fully deserve the thanks and congratulations of all those who are interested in the serious and scientific study of Hindu Law and I have great pleasure in offering you my most hearty congratulations on your achievement."

